Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

IBRAHIM MUMID, FADUMO MUSE, FAHMO AHMED, SAFIYA MOHAMED, IFTU JIBRIL, MAYMUNA MUKTAR OSAMAN, MISBAH IBRAHIM, AMAL MOHAMED, SHAMSA ALI MOHAMED, YURUB SIYAD, MUNA MOHAMED, AMINA HARUN, AND MOHAMUD A. MOHAMED,

Petitioners,

v.

ABRAHAM LINCOLN HIGH SCHOOL, THE INSTITUTE FOR NEW AMERICANS, SPECIAL SCHOOL DISTRICT NO. 1, AND METROPOLITAN FEDERATION OF ALTERNATIVE SCHOOLS, INC.,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Equal Education Opportunity Act of 1974, 20 U.S.C. § 1703(f), provides a damages remedy where a public school has, based on national origin, failed to take appropriate action to overcome language barriers for English language learners.

2. Whether, under the Equal Education Opportunity Act, 20 U.S.C. § 1703(f), and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, direct evidence of discriminatory intent is required to sustain an action against operators of a federally funded school engaged in facially discriminatory practices against Petitioners based on their national origin.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Pursuant to Rule 14.1(b), the caption contains the list of all parties appearing here and before the United States Court of Appeals for the Eighth Circuit.

Pursuant to Rule 29.6, Petitioners state that Petitioners are all individuals. Respondent The Institute for New Americans is a 501(c)(3) nonprofit organization that operated Respondent Abraham Lincoln High School under contract with Respondent Special School District No. 1. Respondent Institute for New Americans has no parent or publicly held company owning 10% or more of its stock. Respondent Special School District No. 1 is the local education agency that operates the Minneapolis public schools. Respondent Metropolitan Federation of Alternative Schools is a 501(c)(3) nonprofit organization with no parent or publicly held company owning 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Mumid *et al* respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in *Mumid et al v. Abraham Lincoln High School et al*, No. 08-3041.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, App. 1a, is published at 618 F.3d. 789 (8th Cir. 2010). The opinion of the United States Court for the District of Minnesota, App 22a, is unreported, and is published at 2008 WL 2811214 (D. Minn.). The opinion of the United States Court for the District of Minnesota denying Petitioner's request to file motion for reconsideration, App. 55a, is unreported, and is published at 2008 WL 2938159.

JURISDICTION

The Court of Appeals filed its opinion on August 25, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The case involves the Equal Education Opportunity Act of 1974 ("EEOA"), 20 U.S.C. § 1703(f), Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d, and the Minnesota Human Rights Act ("MHRA"), Minn. Stat. § 363A.13. The pertinent provisions are reproduced below:

No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs. 20 U.S.C. § 1703(f).

An individual denied an equal educational opportunity, as defined by this subchapter may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate. The Attorney General of the United States (hereinafter in this chapter referred to as the "Attorney General"), for or in the name of the United States, may also institute such a civil action on behalf of such an individual. 20 U.S.C. § 1706

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws. 20 U.S.C. § 1712

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. 42 U.S.C. § 2000d

> It is an unfair discriminatory practice to discriminate in any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby to any person because of . . . national origin. . . . It is an unfair discriminatory practice to exclude, expel, or otherwise discriminate against a person seeking admission as a student, or a person enrolled as a student because of . . . national origin. . . . Minn. Stat. § 363A.13 subd. 1, 2.

STATEMENT OF THE CASE

This case presents two important questions for this Court. The first is whether the EEOA provides a remedy for damages when students have established a violation of the Act—an issue of first impression. The second is whether, when a school district establishes a special school for immigrants and subjects those students to injurious policies not applied in the district's non-immigrant schools, those immigrant students must show discriminatory intent by the district in order to prove a violation of Title VI, or whether the facially discriminatory nature of the policies is sufficient.

This action is for national origin discrimination in education. Petitioners are former students of Respondent Abraham Lincoln High School ("ALHS") and have brought claims for violations of the EEOA, Title VI, and MHRA. Petitioners brought these claims because, on account of Petitioners' foreign-born status, Respondents ALHS, Institute for New Americans ("INA"), and Special School District No. 1 ("District") have failed to take appropriate action to overcome

language barriers by denying special education testing and services, appropriate English language learner instruction, and almost every accoutrement of an adequate education. The court below held that damages are unavailable through actions brought under the EEOA and found with respect to Title VI and MHRA claims that Respondents' treatment of foreign-born students was not facially discriminatory based on national origin. App. 10a-12a.

Respondent ALHS was a high school in Minneapolis for students aged 14 to 21 who had recently immigrated to the United States. App. 64a. Respondent Institute for New Americans operated and managed ALHS under a contract with the Respondent District. App. 3a, 64a-66a. During part of the relevant period, Respondent District had arranged with Metropolitan Federation of Alterative Schools ("MFAS") for Respondent INA to operate ALHS, rather than contracting directly with INA. App. 25a-26a. Both ALHS and INA receive federal funding for the school. App. 32a-33a. The District's Welcome Centers or New Family Centers had a policy that:

> English language learners who are 17 and older and new to the United States or had interruptive education background [should be] place[d] at Wellstone International High School and other alternative High Schools.

(Shulman Aff., Ex. FFF.)

The District "tried to limit" the students at ALHS to immigrants and discouraged non-immigrant parents from sending their children to ALHS, (Schmitz Aff., Ex. 14, p. 107.), and in 2004-05 all of the students at

ALHS were receiving English language learner ("ELL") services, App. 3a. Lacking documentation on ELL students' academic performance, once ALHS enrolled students, the school sought to retain them until they aged out or graduated, not to return them to a mainstream District school or "home" school. (Shulman Aff., Ex. G.) ALHS offered minimal services outside of the classroom, and those services it did offer were inferior to those in mainstream schools since its students, "many who have grown up in refugee camps, were appreciative of whatever education [was] offered." App. 7a.

ALHS used a so-called "English-immersion" curriculum through at least June 2007. (Shulman Aff., Exs. G, DD; Schmitz Aff., Ex. 16, pp. 21, 27-28.) "Students who [were] significantly behind grade level [were] placed in level 9B, and those needing less help [were] placed in grades 9, 10, 11, and 12 on the A side." App. 67a. ALHS had no "school-wide" program to address the MN standards across the curriculum." App. 112a. The staff at ALHS was not qualified to teach a student body consisting entirely of ELL students, and the school did not attempt to "implement[] quality staff development and training" until the 2005-06 school year, and it had no staff development plan prior to then. App. 106a-109a.

After this lawsuit was filed, for the 2005-06 school year, ALHS was still had the goal of "develop[ing] a formalized framework for instruction and assessment, site-based data gathering, analysis, and outcomes." App. 112a. In 2005-06, ALHS's Comprehensive Needs Assessment confirmed this school's failures with scores in the two lowest categories in all areas. App. 123a-126a. For school years beginning in 2002 through

2004, ALHS students had a 17% pass rate on the Minnesota Basic Skills Test, which was less than half the 40% statewide pass rate for ELL students. App. 78a.

Per District policy, "to qualify [for special education testing] students must reside in the U.S. for at least 3 years and be less than 21 years old." (Shulman Aff., Ex. VV.) ALHS and the District attempted to justify not testing ELL students until three years had elapsed by claiming that they had to rule out lack of previous education or limited English proficiency. App. 73a-76a. ALHS student files revealed several instances where students demonstrated a marked lack of progress despite having spent a significant amount of time, in some cases years, at ALHS. App. 69a-73a. ALHS disregarded these warning signs and failed to begin the pre-referral process for special education. *Id.* In ALHS's School Improvement Plan for the 2005-06 school year, however, ALHS admitted it had no such system in place. App. 112a.

In 2005, ALHS students, including some of the Petitioners, lodged a complaint, App. 63a-93a, with the Minnesota Department of Education (MDE) setting forth a series of concerns about the school. On June 9, 2005, MDE issued findings and conclusions concerning ALHS in favor of the complainants. *Id.* Petitioners retained an expert on the education of non-English speaking students, Dr. Martha Bigelow, Associate Professor at the University of Minnesota College of Education and Human Development. Dr. Bigelow characterized the Petitioners as "English language learners with limited formal schooling (ELL LFS). App. 150a-152a. Dr. Bigelow's findings were similar to MDE's findings. App. 150a-190a. Dr. Bigelow found

the ALHS "[first] offers too many non-credit bearing electives that are not content-based and second, as students advance, they continue to take grammar classes and other stand alone ESL classes that are not content based." App. 168a. Further, she found that its "English immersion" curriculum was inappropriate for ELL LFS students. App. 169a-171a. *Inter alia*, this meant ALHS students were accumulating credits in English language courses that did not count toward graduation when they should have been earning credits in required content courses. App. 173a. The result of ALHS's many failures, according to Dr. Bigelow, was that the students at ALHS could not "participate in the educational program offered by the school district." App. 190a.

ALHS has admitted that it did not provide the services to which Petitioners were legally entitled. Chris Nevin, Director of Tutoring at ALHS, stated, "[T]he practice of not testing a student for special ed because they [sic] were not identified and placed on IEP before [age] 18 is, as we now know, unacceptable." (Shulman Aff., Ex. TT.)

Petitioners suffered a variety of harm based on their national origin. After a group of students complained to MDE in February 2005 the school implemented some Section 504 plans, but many Petitioners' 504 plans were used to graduate them out of ALHS without passing the Minnesota Basic Skills Test or without addressing other unmet basic educational needs. Generally, Petitioners either aged out of school and did not graduate, or graduated without having been educated, with skills grossly deficient to enable them to function adequately in society.

The United States District Court for the District of Minnesota had original jurisdiction over this action under 28 U.S.C. § 1331 because Petitioners asserted claims for violations of the EEOA, 20 U.S.C. § 1703(f), and Title VI, 42 U.S.C. § 2000d. Pursuant to 28 U.S.C. § 1367(a), the District Court had supplemental jurisdiction over Petitioners' claims under the Minnesota Human Rights Act, Minn. Stat. § 363A.13, because the state law claims formed part of the same case or controversy as appellants' federal claims. Similarly, the District Court had jurisdiction over Respondent District's third-party complaint against Respondent MFAS for recovery if Respondent District were held liable to Petitioners.

On July 16, 2008, the District Court granted Respondent INA, ALHS, and District's motions for summary judgment, dismissing Petitioners' claims with prejudice, and judgment was entered that day. App. 51a-52a. Though, the District Court found that appellants had presented evidence sufficient to create genuine issues of material fact on the EEOA claims, it dismissed those claims on the ground that there was no remedy (injunctive or damages) available to appellants and that they lacked standing to sue. App. 43a. Even though the District Court found "no dispute that District 1 [including ALHS] had a general policy of refusing to test foreign-born students for special education services until the students had taken three years of ELL classes," App. 40a, the District Court dismissed Petitioners' claims under Title VI and the MHRA because, it claimed, Petitioners' direct evidence of intentional discrimination was "quite weak," and appellants had only shown disparate impact, App 34a. (D. Minn.) The District Court consequently found

Respondent District's third party complaint against Respondent MFAS moot.

Pursuant to Federal Rules of Appellate Procedure 3 and 4, on July 23, 2008, Petitioners timely filed a Notice of Appeal of the judgment entered in the District Court. The Eighth Circuit Court of Appeals had jurisdiction of this case pursuant to 28 U.S.C. § 1291, because appellants had timely appealed from the final judgment.

Petitioners argued for applying *UAW v. Johnson Controls*, 499 U.S. 187 (1991), to the Title VI and MHRA matters, asserting that "because the policy of delaying special education testing for three years affected solely foreign-born students, the policy was discriminatory on its face, and no further evidence of motive was required." App. 9a. Even though the District Court found "no dispute that District 1 [including ALHS] had a general policy of refusing to test foreign-born students for special education services until the students had taken three years of ELL classes," App. 40a, the Court of Appeals held:

> [t]he rationale of *Johnson Controls* and similar cases . . . is not controlling here, because . . . . A policy that treats students with limited English proficiency differently from others students in the district does not facially discriminate based on national origin.

App. 10a. The Court of Appeals affirmed the District Court's holding that Petitioners have no (injunctive) remedy under the EEOA, reasoning that, as Petitioners have all aged out of or graduated from ALHS, none will ever return. App. 15a. Further, the

Eighth Circuit construed the 20 U.S.C. § 1713 language on court EEOA remedies "which may involve directly or indirectly the transportation of students" to establish exclusively equitable remedies under the EEOA. App. 18a. On August 25, 2010, the Court of Appeals affirmed the judgment of the District Court. App. 19a.

REASONS FOR GRANTING THE WRIT

A. The EEOA Provides for Damages per *Franklin v. Gwinnett County Public Schools*

This is a case of first impression, presenting for the first time the question of whether the EEOA provides a damages remedy for students victimized by violations of the Act. The Petitioners in this case are all immigrant students who have aged out of the Minneapolis school system and are no longer eligible for enrolment in the public schools. Petitioners have presented sufficient evidence to establish violations of the EEOA during the time they were enrolled. Because of their age and the delays inherent in litigation, Petitioners are ineligible for equitable relief to redress their injuries. The ruling of the lower courts that damages are unavailable under the EEOA leaves Petitioners with no remedy at all. This is an unjust result that Congress never intended. It is contrary both to the language of the EEOA and to this Court's decisions concerning statutory construction and the availability of statutory remedies. It is based on convoluted and insupportable reasoning in the opinions below. It cries out for review by this Court to correct a serious miscarriage of justice and to provide future guidance to lower courts in cases brought under this important federal statute.

In construing a statute, this Court "presume[s] the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 66 (1992) (citing *Davis v. Passman*, 442 U.S. 228, 246-47 (1979). Section 1706 of the EEOA authorizes a civil action "for such relief[] *as may be appropriate*," and does not limit the remedies available to injunctive relief. 20 U.S.C. § 1706 (emphasis added). "[A] court . . . shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection." *Id.*

Yet, the Eighth Circuit, contrary to *Franklin*, read damages out of the EEOA. Contrary to *Franklin*, the Eighth Circuit held that "the language and structure of the EEOA firmly indicate that Congress authorized only equitable remedies for violations of the statute." App. 19a. Yet, the Eighth Circuit found no statutory indications limiting remedies to injunctive relief. Instead the Court found damages to be unavailable on the basis of the Act's prioritizing equitable remedies that "may involve directly or indirectly transportation of students." 20 U.S.C. §1712. This was a serious and fundamental misreading of the Act, requiring action by this Court to correct it.

B. Damages are a Just and Often Necessary Remedy for EEOA Violations

EEOA plaintiffs must be entitled to bring actions for damages where essential, as provided for by statute. Litigation under the EEOA comes with inherent delays. There is always a danger that student plaintiffs may be out of school or beyond school age by the time their claims are fully adjudicated. Precluding

actions for damages under the EEOA, a statute that in no way limits remedies at law, will allow school districts to prevail by stalling. Worse, cases of national origin discrimination against public school students often involve children who are already school age when migrating into the United States. This means plaintiffs in these cases often have fewer years left before graduation or becoming too old for the public school system in which to litigate such claims than non-immigrant children with EEOA claims. Allowing actions for damages, as provided for under the EEOA, provides a strong disincentive for schools to drive potential EEOA plaintiffs out of school, wait for them to age of the public school system, or graduate them without providing them their due equal educational opportunity.

Regardless of the amount of time that has elapsed, once an EEOA plaintiff prevails in establishing a violation of the Act, the injury sustained by the plaintiff may not be reparable within the remaining time the plaintiff has left in the public school system under even a maximal award of injunctive relief. Per the EEOA, where "essential," the Courts should find damages appropriate as a means of enabling plaintiffs to pursue remedial education or a compensation for diminished earning power.

This Court has held that "although we examine the text and history of a statute to determine whether Congress intended to create a right of action, *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979), **we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise**." *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 66 (1992) (citing *Davis v.*

Passman, 442 U.S. 228, 246-47 (1979) (emphasis added)). The lower courts misread the provisions of the EEOA to determine that monetary damages are not allowed under the statute. Although the courts acknowledged that 20 U.S.C. § 1706 grants individuals a private cause of action, they nonetheless concluded that the only relief available to appellants would be injunctive relief and that any injunctive relief is moot. The District Court relied on the absence of prior cases awarding money damages under the EEOA. App. 45a. The Eighth Circuit affirmed the District Court despite the statute's lack of limitation of remedies, contrary to *Franklin*. Section 1706 allows private suits for violations and allows "for such relief, *as may be appropriate*." *Id.* (emphasis added). Section 1706 does not limit remedies to injunctive relief; therefore, *Franklin* requires that damages are presumed available under the EEOA. The Petitioners have shown a violation causing them harm, but, with damages having been misread out of the EEOA by the lower courts, Petitioners have no remedy for their injuries, a result Congress never intended, and an injustice this Court should correct.

C. *Castaneda* Does Not Require Proof of Intent for Victims of Facially Discriminatory Policies for EEOA Claims and *Johnson Controls* Does Not Require Proof of Intent For Title VI Claims

Since Respondents' policies facially discriminated against Petitioners on the basis of their national origin, neither the EEOA claims nor the Title VI claims require proof of intent. Instead the courts are to infer this intent from the policies themselves. The District Court noted that Petitioners argued that:

> [ALHS's] shortcomings amounted to intentional discrimination against them on the basis of their national origin. [Pls.' Mem. Opp'n Defs.' Mots. Summ. J. at 1.] ("The evidence of record in this case establishes that defendants collectively were responsible for the establishment and operation of a substandard high school that essentially warehoused immigrant students until they aged out of the school system without even the rudiments of an adequate education, solely because they were immigrants.")

App. 28a.

Petitioners noted in District Court that in *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981), this Court explained that:

> the failure of an educational agency to undertake appropriate efforts to remedy the language deficiencies of its students, *regardless of whether such a failure is motivated by an intent to discriminate against those students*, would violate [20 U.S.C.] § 1703(f). *Id.* at 1008 (emphasis added). Thus, under § 1703(f) it is not necessary to show discriminatory intent.

(Pls.' Mem. Opp'n Defs.' Mots. Summ. J. at 149-50.)

Again, as Petitioners argued in District Court and at the Eighth Circuit, the Respondents "specifically created and operated ALHS as a school for immigrants only, and then treated this segregated student population in a manner different from the non-immigrant population of the school district, by denying

them special education and services, appropriate English language learner instruction, and almost every other accoutrement of an adequate education." *Id.* at 1-2. Specifically, the District had a policy that "[t]o qualify [for special education testing] students must reside in the U.S. for at least 3 years and be less than 21 years old." *Id.* at 14. ALHS was by design a school for students whose national origin was other than from the United States. *Id.* at 64. From 1997 through at least the 2006-07 school year, ALHS was a high school in Minneapolis for students aged 14-21 who were immigrants to the United States. *Id.* Respondents singled out students for attendance at ALHS on account of their national origin. *Id.* at 67.

McDonnell Douglas burden shifting analysis applies to Title VI claims. *See Quarles v. Oxford Mun. Separate Sch. Dist.*, 868 F.2d 750, 754 n. 3 (5th Cir. 1989); *Fuller v. Rayburn*, 161 F.3d 516 (8th Cir. 1998). However, "for facially discriminatory practices and policies, the element of intent is inferred from the language, and the Court engages in no additional inquiry to determine whether the statute or policy was discriminatory." *See* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 290 (1997) (citations omitted). Namely, in *UAW v. Johnson Controls,* this Court held, when a policy is discriminatory on its face, that the policy is "ostensibly benign" is irrelevant to the question of whether it violates the discrimination laws. 499 U.S. 187, 198 (1991); *see also Hulteen v. AT&T*, 498 F.3d 1001, 1012 (9th Cir. 2007) ("Facial discrimination is 'by its very terms' intentional discrimination.") Accordingly, where a policy discriminates on its face, "[t]here is no need to probe for a potentially discriminatory motive

circumstantially." *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501, n. 16 (10th Cir. 1995) (citation omitted).

Under 42 U.S.C. § 2000d, "No person in the United States shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." "There is no dispute that [Respondent] District 1 had a general policy of refusing to test foreign-born students for special-education services until the students had taken three years of ELL classes." App. 40a. This policy on its face withheld a benefit, special education testing, from foreign born students, that it did not withhold from non-foreign born students. As such, the policy "facially single[d] out the [foreign-born students] and appl[ied] different rules to them. *Bangerter*, 46 F.3d at 1500. "Thus, the discriminatory intent and purpose of the [policy] are apparent on their face." *Id.* Since *Johnson Controls*, the federal courts have consistently rejected a requirement that a defendant harbor hostility toward the protected class. *See, e.g., Erie Cnty. Retirees Ass'n v. Cnty. of Erie*, 220 F.3d 193, 212 (3d Cir. 2000) (age); *Larkin v. Michigan Dep't of Soc. Servs.*, 89 F.3d 285, 290 (6th Cir. 1996) (disability); *Johnson v. New York*, 49 F.3d 75 (2d Cir. 1995) (age). Yet, the Eighth Circuit, failed to apply *Johnson Controls* to Respondents' policies.

In affirming the District Court on this matter, the Eighth Circuit found "'[t]he policy of delayed testing did not apply to all foreign-born students in the school district, but only to students categorized as "English language learners."' App 10a. In the same opinion, the

Eighth Circuit described the District Court's supposedly non-pretextual rationale for its policy with respect to two Petitioners as follows: "[T]he [Respondent] District offered a legitimate non-discriminatory reason for the policy – namely, that it did not believe that it could reliably assess whether a student needed special-education services *until the student had been in the country long enough to learn English*. App. 8a-9a (emphasis added). The Respondents' policies were not geared only at English language learners, or even at all English language learners, instead they facially discriminated against students of foreign national origin (but even if they only withheld special education testing and services from foreign born students who were English language learners, this would still be facially discriminatory based on national origin).

D. Today's Public Schools Need Supreme Court Guidance That Such Policies are Facially Discriminatory, and Public Policy Dictates That Such Policies Should be Prohibited

Change in the nature of public schools is nothing new, but public school districts subcontracting out their duties (as in this case) is likely to increase, especially in an economic climate where municipalities are increasingly exploring contracting out vital functions. When a local educational agency subcontracts with a contract school operator, however, the application of traditional discrimination jurisprudence is more likely to prove inadequate, particularly if Courts hesitate to apply *Johnson Controls* and *Castaneda*, leaving (de jure) discrimination victims perhaps unable to find a comparator within contract schools that are de facto

segregated. At the same time, this allows the contract school to act as a buffer between school district and student, facilitating a shell game, where the purpose may be to provide different education to a protected class, but the adversely affected student is hard pressed to pin discriminatory intent on the district (or its contract school operator) despite a harmful facially discriminatory policy.

Increasing school choice further threatens to make the Court's categories of discrimination jurisprudence obsolete as applied to public schools where, in addition to facially discriminatory policies like that of the Petitioners, school choice itself promotes segregation-in-fact of members of protected classes and where programming across sites operated or contracted by a single school district varies significantly. Improper application of current Supreme Court precedent by the lower courts threatens to allow Minneapolis Public Schools and other school districts and local education agencies to contract themselves out of needing to comply with a multitude of discrimination laws (even those addressing disparate treatment and facially discriminatory policies) and, perhaps worse, to contract themselves out of susceptibility to disparate impact discrimination claims. Failing to establish a rule clarifying that all Circuits must apply *Johnson Controls* and *Castaneda* in this type of case sends a message to other schools (and perhaps other local entities subject to similar discrimination claims) that they can contract their way out of liability.

Allowing the Eighth Circuit decision to remain where it stands on this national origin discrimination decision would be akin to allowing the Eighth Circuit to revert back to *Plessy* on race discrimination and

then take one more step back from "separate but equal," because, at least under the low watermark of *Plessy*, racially discriminating school districts pretended (with a wink and a nod) that there was some semblance of equality for the relevant protected class. Respondents implemented a facially discriminatory policy depriving the Petitioners of education benefits. Foreign-born students, including Petitioners, were encouraged by Respondents to attend a separate school designed for foreign-born students, where all students could be subjected to the same deprivation of special education benefits and not know any better. Even if some aspects of this were arguably for Petitioners' benefit, *Johnson Controls* and *Castaneda* establish that they can still cry foul.

Similar problems exist for charter schools. In Minnesota, for example, charter schools operate as separate local educational agencies but without fixed geographical areas (aside from their state), and in this matter, Petitioner ALHS actually discontinued operation under its contract with Petitioner Special School District No. 1 and reopened as a charter school. Further, under *Milliken v. Bradley*, school desegregation jurisprudence, courts cannot issue multidistrict decrees in most cases. 418 U.S. 717, 744-45 (1974) (violation in one district must be shown to produce significant segregative effect in another district before a multidistrict remedy will be allowed). The courts are in dire need of a rule to find disparate treatment where there are facially discriminatory policies at work. This need is tremendously amplified by the increasing complexity of the local education agencies and the contractual arrangements to which *Johnson Controls* and *Castaneda* must be applied in the 21st century.

This Court has held that "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect." *Johnson Controls*, 499 U.S. at 199. "There is no dispute that District 1 had a general policy of refusing to test foreign-born students for special-education services until the students had taken three years of ELL classes." App. 40a. As such, the policy "facially single[d] out the [foreign-born students] and appl[ied] different rules to them." *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1500 (10th Cir. 1995). "Thus, the discriminatory intent and purpose of the [policy] are apparent on their face." *Id.* The District attempted to justify not testing, App. 73a-76a, but the MDE found the District's claimed justification unlawful: "The District violated 34 C.F.R. § 300.534(b) when it failed to evaluate students because of their lack of previous instruction or limited English proficiency." App. 89a.

The District never challenged this MDE finding in state court nor did it attempt to argue in the District Court that the three-year waiting period was justified. The District Court, however, improperly ignored the facially discriminatory nature of the three-year waiting period and relied on a requirement that the defendant harbor hostility toward the suspect class. This was affirmed by the Eighth Circuit, contrary to *Johnson Controls* and its progeny, which reject such a hostility requirement. A policy applied only to foreign-born students making them wait for a three-year period for testing (even to rule out disabilities) and then, for some, after three years refusing to test them or provide services due to their not being on an IEP before age 18, yet keeping them on the rolls the entire time, is hardly benign. Respondents created and

maintained a school with a substandard curriculum for students having national origins other than the United States. Students in this school were deprived *inter alia* of special education assessments that could both *rule out* and diagnose disabilities, and thus all Petitioners who were candidates for this testing have established injury under EEOA, Title VI, and the MHRA. They should have access to a remedy under these statutes without needing further proof of discrimination and should be able to bring an action for damages under the EEOA under the principles of construction set out by this Court in *Franklin v. Gwinnett*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 22, 2010

APPENDIX

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 08-3041

[Filed August 25, 2010]

Ibrahim Mumid; Fadumo Muse; Fahmo Ahmed; Safiya Mohamed; Iftu Jibril; Maymuna Muktar Osman; Misbah Ibrahim; Amal Mohamed; Shamsa Ali Mohamed; Yurub Siyad; Muna Mohamed; Amina Harun; Mohamed A. Mohamed,	)
Plaintiffs/Appellants,	)
v.	)
Abraham Lincoln High School; The Institute for Americans; Special School District No. 1,	)
Defendants/Appellees,	)
Special School District No. 1,	)
Third Party Plaintiff/Appellee,	)

v.)
)
Metropolitan Federation of)
Alternative Schools, Inc.,)
)
Third Party Defendant/Appellee.)
)

Appeal from the United States District Court
for the District of Minnesota.

Submitted: October 20, 2009
Filed: August 25, 2010

Before COLLOTON, BEAM, and
BENTON, Circuit Judges.

COLLOTON, Circuit Judge.

Ibrahim Mumid and twelve of his former schoolmates brought suit against the Institute for New Americans and Special School District No. 1 of the Minneapolis Public Schools ("the District"). They alleged violations of the Equal Educational Opportunities Act, Title VI of the Civil Rights Act of 1964, and the Minnesota Human Rights Act. The district court[1] granted summary judgment for the defendants on all counts, and we affirm.

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[1] The Honorable Patrick J. Schiltz, United States District Judge for the District of Minnesota.

I.

The thirteen plaintiffs are former students at Abraham Lincoln High School ("ALHS"), an alternative high school for immigrant students. During the relevant period, ALHS was operated by the Institute for New Americans ("INA"), a non-profit entity, under contract with the Minneapolis Public Schools ("MPS").[2] ALHS served students aged 14 and older who had arrived recently in the United States. About two-thirds of the student body had reached the age of 18. Almost all ALHS students were refugees. A large majority of ALHS students received English Language Learner ("ELL") services, including the entire student body in 2004-05.

The plaintiffs in this case are typical ALHS students. All thirteen are natives of either Somalia or Ethiopia; all lived for some time in Kenyan refugee camps before coming to the United States; and all arrived in this country between the ages of 14 and 20 with little or no formal education and limited facility with English.

The plaintiffs attended ALHS between 1999 and 2006. Five of these students graduated from ALHS after fulfilling (or being excused from) the State's

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[2] INA is a member of another nonprofit entity, the Metropolitan Federation of Alternative Schools ("MFAS"), and from 1997 to 2003, the District contracted with INA through MFAS. [Order at 1–3]. After the students sued INA and the District, the District filed a third-party complaint against MFAS seeking recovery if the District were held liable to the students. The district court's grant of summary judgment rendered moot this complaint against MFAS.

graduation requirements. Eight never graduated because they were not able to pass the requisite statewide exams (the Minnesota Basic Skills Tests, or "MBSTs"). Although the State discontinues public funding for students who reach age 21, ALHS permitted several of the plaintiffs to remain enrolled beyond that age in an attempt to complete their education.

In early 2005, a group of ALHS students (including some of the appellants) lodged a complaint with the Minnesota Department of Education ("MDE"), alleging that ALHS was not adequately meeting their educational needs. The MDE opened an investigation, and found in June 2005 that the school was failing to provide adequate educational services in several ways. The MDE determined that ALHS had not used a successful method to recognize disabilities, with the result that "[i]t is highly probable that ALHS . . . missed the identification of numerous special education students each of the past three school years." The MDE based this assessment in part on the fact that the state average for special education students within a given school population was 12.5%, while ALHS had identified less than one percent of its student body as eligible for special education services during the years studied. The MDE noted, too, that ALHS students taking the MBSTs had a 17% passage rate, compared to a statewide passage rate of around 40% for English Language Learners, and that ALHS had an unusually high number of students "age out," *i.e.* reach the age of 21 without graduating from high school. "The data indicates that the Students of ALHS are in need of something more than is being provided," concluded the MDE.

The Department also identified the District's "misunderstanding of the law" regarding special education testing. Despite federal and state regulations requiring school districts to implement systems designed to identify students with learning disabilities, and instructing that students with limited English proficiency should not be excluded from testing and services for students with special educational needs, *see* 34 C.F.R. § 300.532(a)(1); Assistance to States for the Education of Children with Disabilities, 64 Fed. Reg. 12635-36 (Mar. 12, 1999); Minn. R. 3525.0750, the District did not evaluate ELL students for special education until they had been in the school system for three years.

Finally, the MDE faulted the District – and ALHS, under its direction – for violating Minnesota law by failing to develop remediation plans for students who had not yet passed one or more of the required MBSTs at least two years before their anticipated graduation dates. *See* Minn. R. 3501.0110. The MDE prescribed a series of corrective actions that the District and ALHS were required to take to rectify these shortcomings. On April 4, 2007, the MDE declared that the District had completed the required course of corrective action.

Meanwhile, in September 2005, the plaintiffs filed a complaint – based in part on the MDE's findings – against the Institute for New Americans, operating as Abraham Lincoln High School, and Special School District No. 1. The complaint as later amended, filed in October 2006, alleged violations of the Equal Educational Opportunities Act ("EEOA"), 20 U.S.C. §§ 1701-1758, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the Minnesota Human Rights Act ("MHRA"), Minn. Stat. § 363A.13. The district

court granted summary judgment for the Institute and the District on all counts. *Mumid v. Abraham Lincoln High School*, No. 0:05-CV2176, 2008 WL 2811214 (D. Minn. July 16, 2008).

II.

We review a district court's grant of summary judgment *de novo*, viewing the record in the light most favorable to the nonmoving party. *Cooksey v. Boyer*, 289 F.3d 513, 515 (8th Cir. 2002). We will affirm the grant of summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Title VI of the Civil Rights Act of 1964 provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. The MHRA similarly provides, in relevant part: "It is an unfair discriminatory practice to discriminate in any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby to any person because of race, color, creed, religion, [or] national origin . . . ." Minn. Stat. § 363A.13, subd. 1. The MHRA is typically construed in accordance with federal precedent concerning analogous federal statutes, *Rothmeier v. Inv. Advisers, Inc.*, 85 F.3d 1328, 1338 (8th Cir. 1996), and neither party argues that the federal and state standards should differ in this case. We will thus

consider the claims together, but refer only to Title VI for the sake of simplicity.

The students allege that ALHS and the District discriminated against them on the basis of their national origin in two distinct but overlapping ways: (1) generally, by providing a substandard curriculum and programming, and (2) more specifically, by failing to offer timely special education testing and services.

To support their first allegation, the students argue that ALHS provided fewer educational and extracurricular opportunities to them than were available to students at other area high schools. They point to statements made in a self-assessment completed by the Institute for New Americans in April of 2007:

> Since INA is gaining its financial legs, it wants to now focus on the quality of education for its students. These students, many who have grown up in refugee camps, are appreciative of whatever education is offered to help them pursue their American dream. Unlike other schools in MN, the services offered by [ALHS] outside of the classroom are minimal. We need to offer arts & sports as well as more specialized services such as helping recent immigrants better integrate into American society.

The students also note that ALHS did not offer a program for gifted students or vocational instruction. They argue that these curricular shortcomings, occurring in a school serving only foreign-born students, amounted to discrimination on the basis of national origin. In support of the second allegation,

they argue that the policy of not testing ELLs for learning disabilities or other special educational needs until students had been in the school system for three years – a policy that the MDE found to be in violation of federal law – constituted unlawful discrimination.

In rejecting the claim based on substandard curriculum and programming at ALHS, the district court observed correctly that Title VI prohibits only intentional discrimination. Proof of disparate impact is not sufficient. *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001). The court found no genuine issue of fact regarding discriminatory intent, because there was no strong evidence of animus based on statements of school personnel, and because the students were unable to identify any "comparator" – a person not a member of the same allegedly protected class – who was treated more favorably than the plaintiffs by ALHS. The court rejected the claim against ALHS based on delayed special-education testing for the same reasons.

On the claim of delayed testing against the District, the court thought there was a prima facie case of discrimination, because foreign-born students were denied special-education testing until they took three years of ELL classes, while native-born students were offered special-education testing as needed. The court gave two reasons for nonetheless rejecting the claim. First, eleven of the thirteen plaintiffs failed to present evidence that they suffered any injury from the policy. Second, with respect to the other two students, the District offered a legitimate non-discriminatory reason for the policy – namely, that it did not believe that it could reliably assess whether a student needed special-education services until the student had been

in the country long enough to learn English. The court ruled that the students failed to present sufficient evidence to show that the District's rationale was a pretext for discrimination based on national origin.

On appeal, the students contend that there was no need for evidence of "comparators" to show discriminatory intent. Citing *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), they assert that because the policy of delaying special education testing for three years affected solely foreign-born students, the policy was discriminatory on its face, and no further evidence of motive was required. This complaint of a "facially" unconstitutional policy was not raised in the district court, and *Johnson Controls* was not cited in the extensive briefing on the motions for summary judgment. We are thus hard pressed to see why the contention is not waived. *See Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720, 725 (8th Cir. 2002).[3]

In any event, we also believe that the contention is without merit. The students rely heavily on *Johnson Controls*, where the Supreme Court held that a policy affecting only "women who are pregnant or who are capable of bearing children" violated Title VII of the Civil Rights Act. The plaintiffs in that case were not required to prove that Johnson Controls acted with discriminatory intent in fashioning the policy, because "the absence of a malevolent motive does not convert

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[3] The students also quarrel with the district court's conclusion that eleven of the thirteen students suffered no injury from the delayed testing. We agree with the district court's conclusion, but even if there were error on that point, the claims fail on the merits for the reasons discussed.

a facially discriminatory policy into a neutral policy with a discriminatory effect." *Johnson Controls*, 499 U.S. at 199. The policy itself was sufficient to prove a Title VII violation. *See also Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1049 (9th Cir. 2007) (discrimination against women and families); *Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193, 212 (3d Cir. 2000) (age discrimination); *Larkin v. Mich. Dep't of Soc. Servs.*, 89 F.3d 285, 290 (6th Cir. 1996) (discrimination against the disabled); *Johnson v. New York*, 49 F.3d 75, 79 (2d Cir. 1995) (age discrimination).

The rationale of *Johnson Controls* and similar cases cited by the students is not controlling here, because no policy of the District or ALHS singled out a protected class on its face. The policy of delayed testing did not apply to all foreign-born students in the school district, but only to students categorized as "English language learners." While Title VI prohibits discrimination on the basis of national origin, language and national origin are not interchangeable. *See Hannoon v. Fawn Eng'g Corp.*, 324 F.3d 1041, 1048 (8th Cir. 2003); *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983); *Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir. 1980). A policy that treats students with limited English proficiency differently than other students in the district does not facially discriminate based on national origin.

The students reiterate their contention that the alleged substandard programming at ALHS is also strong evidence of intentional discrimination by ALHS based on national origin. But they again fail to identify a similarly situated comparator whom the school treated more favorably, and deficient programming in

and of itself is not evidence of intentional discrimination based on national origin. The district court thus properly granted summary judgment to ALHS and the District on the Title VI and MHRA claims.

III.

Under the requirements of the Equal Educational Opportunities Act, "[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f). The students claim that the District violated this law by failing to meet its obligation "to take appropriate action to overcome language barriers." They seek actual and punitive damages, as well as injunctive relief requiring the District to close ALHS and forbidding the conduct alleged in the complaint to be unlawful.

The district court determined that the students had presented evidence sufficient to survive summary judgment on the question whether the District took "appropriate action" to overcome the students' language barriers. The district court nonetheless granted summary judgment for the District on the students' EEOA claim. The court held that the plaintiffs lacked standing because no remedy was available under the statute to redress their alleged injury. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 106 n.7, 129 & n.20 (1983). The court reasoned that because no plaintiff will ever again attend ALHS, injunctive relief could not redress the plaintiffs'

injuries, and that monetary damages are not available under the EEOA.

We will assume for the sake of argument that there is sufficient evidence for a reasonable jury to find that the District failed to take appropriate action to overcome language barriers that impeded equal participation by the plaintiffs in the District's instructional programs. We will further assume that this evidence of failure to take appropriate action could support a finding that the District denied equal educational opportunity "on account of . . . national origin." 20 U.S.C. § 1703. We affirm the district court's dismissal of the EEOA claim, because we agree that neither injunctive relief nor monetary damages are available to these plaintiffs.

A.

Congress passed the EEOA in 1974, as a floor amendment to legislation amending the Elementary and Secondary Education Act of 1965. *See Castaneda v. Pickard*, 648 F.2d 989, 1001 (5th Cir. Unit A June 1981). President Nixon first proposed the Act in 1972, declaring that its purpose would be "to clear up the confusion which contradictory court orders [in the wake of *Brown v. Board of Education*, 347 U.S. 483 (1954)] have created, and to establish reasonable national standards" for continuing the process of school desegregation. Special Message to the Congress on Equal Educational Opportunities and School Busing, 1972 Pub. Papers 430 (Mar. 17, 1972). Representative Marvin Esch, introducing the same legislation in March 1974, explained that the purpose of the proposed amendment was to reduce cross-district busing and emphasize the assignment of

students to schools close to their homes. 120 Cong. Rec. 8264-65 (1974) (statement of Rep. Esch). In addition to "reemphasiz[ing] education in neighborhood schools," he thought the amendment would "define . . . both denials of equal educational opportunities and remedies available to overcome such denials." *Id.* at 8265.

The EEOA describes six ways in which a State must not deny equal educational opportunity on account of race, color, or national origin. 20 U.S.C. § 1703. The first five proscriptions clearly are aimed at eradicating the lingering effects of segregation in the public school system. *Id.* § 1703(a)-(e). The sixth prohibited practice, "the failure . . . to take appropriate action to overcome language barriers," § 1703(f), is at issue here.

A person who is denied an equal educational opportunity may bring a civil action in federal court "against such parties, and for such relief, as may be appropriate." *Id.* § 1706. The statute gives direction on formulating an appropriate remedy, ordering that "a court, department, or agency . . . shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws." *Id.* § 1712. A section titled "Priority of remedies" then specifies:

> In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, which may involve directly or indirectly the transportation of students, a court, department, or agency of the United States shall consider and make specific findings on the efficacy in correcting such denial

of the following remedies and shall require implementation of the first of the remedies set out below, or of the first combination thereof which would remedy such denial:

(a) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account school capacities and natural physical barriers;

(b) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account only school capacities;

(c) permitting students to transfer from a school in which a majority of the students are of their race, color, or national origin to a school in which a minority of the students are of their race, color, or national origin;

(d) the creation or revision of attendance zones or grade structures without requiring transportation beyond that described in section 1714 of this title;

(e) the construction of new schools or the closing of inferior schools;

(f) the construction or establishment of magnet schools; or

(g) the development and implementation of any other plan which is educationally sound and

> administratively feasible, subject to the provisions of sections 1714 and 1715 of this title.

Id. § 1713. Several subsequent provisions are likewise concerned with equitable relief. *Id.* §§ 1714-18.

B.

In their complaint, the students requested an injunction that would either require the District to close ALHS or allow ALHS to remain open but forbid it to engage in any practices deemed unlawful. The students lack standing to seek this injunctive relief. None of the plaintiffs currently attends ALHS and none will ever return, because all have graduated high school or aged out of the public school system. An order that the school must close or conform to certain legal requirements will not redress the injuries alleged by these students. *See Lyons*, 461 U.S. at 106 n.7. The standing problem is compounded by the fact that the entity formerly known as Abraham Lincoln High School now operates as an independent charter school under the name Lincoln International High School ("LIHS"). LIHS and the Minneapolis Public Schools have no contractual relationship, and the District retains no authority over LIHS. Because the District cannot bind the school, a court order directed at the District could not redress the alleged injuries of the students. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568 (1992).

C.

The students also sought monetary damages against the District for a violation of their right to

equal educational opportunity. The statute by its terms does not authorize monetary damages, but the students point to the broad language of § 1706, which authorizes a civil action "for such relief[] as may be appropriate." They couple this statutory text with the Supreme Court's direction to "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 66 (1992). *Franklin* recounted that "[t]his principle has deep roots in our jurisprudence," *id.*, and relied on it to hold that damages were available in a suit brought pursuant to the implied right of action under Title IX of the Education Amendments of 1972.

The Court's explication in *Franklin*, however, revealed limitations on the traditional presumption. All appropriate relief is available "*when Congress has given no indication of its purpose* with respect to remedies." *Id.* at 68 (emphasis added). A federal court may order any appropriate relief when a right of action exists to enforce a federal right, and "*Congress is silent* on the question of remedies." *Id.* at 69 (emphasis added). It is well established that a precisely drawn statute usually preempts more general remedies, *Hinck v. United States*, 550 U.S. 501, 506 (2007), and a provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme. *See United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

Congress was not silent about remedies in the EEOA. Indeed, the opening section declares that the very purpose of the subchapter is "*to specify appropriate remedies* for the orderly removal of the vestiges of the dual school system." 20 U.S.C. § 1701

(emphasis added). The language and structure of the EEOA indicate that the congressional purpose was to provide only equitable remedies for a violation of the statutory rights created by the statute.

Section 1712 provides that a court shall impose "only such remedies as are essential *to correct* particular denials of equal educational opportunity or equal protection of the laws." 20 U.S.C. § 1712 (emphasis added). "Correct" means "to make or set right," or "to alter or adjust so as to bring to some standard or required condition." *Webster's Third New International Dictionary* 511 (1971). As the district court observed, the verb "correct" is not a natural way to refer to monetary damages, which *compensate* a person for past wrongs without changing the underlying fault or failing that caused the harm. The inference that Congress was focused on relief other than damages is strengthened by § 1713, which directs a court to consider the efficacy of several *equitable* remedies "in correcting" a denial of equal educational opportunity. 20 U.S.C. § 1713.

Section 1713 also sets forth a "priority of remedies" that a court must consider "[i]n formulating a remedy for a denial of equal educational opportunity." All seven of these remedies are equitable; monetary damages are never mentioned. The statute thus clearly departs from the "ordinary convention" described in *Franklin* that "a court should determine the adequacy of a remedy in law *before* resorting to equitable relief." 503 U.S. at 75-76 (emphasis added). This structure further undermines the suggestion that the "traditional presumption" applied in *Franklin* should be used to infer the availability of monetary damages under the EEOA.

We think the better reading of § 1713 is that it applies to all denials of equal educational opportunity under the EEOA, including a failure to take appropriate action to overcome language barriers under § 1703(f). Section 1713 does refer to remedies involving "directly or indirectly the transportation of students," but – according to usage of the era – the reference comes in a non-restrictive clause set off by commas: "In formulating a remedy . . . , *which may involve* directly or indirectly the transportation of students, a court . . . shall consider . . . the following remedies . . . ." 20 U.S.C. § 1713 (emphasis added). *See* William Strunk Jr. & E. B. White, *The Elements of Style* 1, 3 (2d ed. 1972) (describing an "elementary rule[] of usage" that a "nonrestrictive clause is one that does not serve to identify or define the antecedent noun," and that "[n]onrestrictive relative clauses are parenthetic," such that "[c]ommas are therefore needed"); *id.* at 53 ("*That* is the defining, or restrictive, pronoun, *which* the nondefining, or nonrestrictive."); *The Chicago Manual of Style*, ¶ 5.27 (12th ed. 1969) (instructing that "[i]f a dependent clause following a main clause is restrictive . . . it should not be set off by a comma. If it is non-restrictive, it should be set off by a comma."). The reference to transportation of students, therefore, does not limit the application of § 1713 to cases that involve that particular remedy. *See United States v. Indoor Cultivation Equip.*, 55 F.3d 1311, 1315 (7th Cir. 1995) ("Congress's use of the pronoun 'which' is significant; it introduces a nonrestrictive clause – '*which* are used to ... facilitate [drug transactions]' – that does not limit the meaning of the word it modifies – 'conveyance.'"); *cf. In re Connors*, 497 F.3d 314, 319 (3d Cir. 2007) ("The word 'that' is a relative pronoun that restricts and, therefore, modifies, the preceding noun, 'foreclosure

sale.' Thus, when the statute refers to 'a foreclosure sale *that* is conducted in accordance with applicable nonbankruptcy law,' it clearly refers to a foreclosure sale that complies with state-law procedures.") (emphasis added). Beyond the listing of priorities in § 1713, moreover, each of the remaining sections, §§ 1714-1718, also focuses exclusively on equitable remedies and make no mention of damages.

For these reasons, the language and structure of the EEOA firmly indicate that Congress authorized only equitable remedies for violations of the statute. The district court correctly held that monetary damages are unavailable under the EEOA.

* * *

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 08-3041

[Filed August 25, 2010]

Ibrahim Mumid; Fadumo Muse; Fahmo Ahmed; Safiya Mohamed; Iftu Jibril; Maymuna Muktar Osman; Misbah Ibrahim; Amal Mohamed; Shamsa Ali Mohamed; Yurub Siyad; Muna Mohamed; Amina Harun; Mohamed A. Mohamed,

Plaintiffs - Appellants

v.

Abraham Lincoln High School; The Institute for Americans; Special School District No. 1,

Defendants - Appellees

Special School District No. 1,

Third Party Plaintiff - Appellee

v.

Metropolitan Federation of

Alternative Schools, Inc.,)
)
Third Party Defendant - Appellee)
)

Appeal from U.S. District Court
for the District of Minnesota - Minneapolis
(0:05-cv-02176-PJS)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

August 25, 2010

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Case No. 0:05-CV-2176 (PJS/JJG)

[Filed July 16, 2008]

IBRAHIM MUMID, FADUMO MUSE, FAHMO AHMED, SAFIYA MOHAMED, IFTU JIBRIL, MAYMUNA MUKTAR OSMAN, MISBAH IBRAHIM, AMAL MOHAMED, SHAMSA ALI MOHAMED, YURUB SIYAD, MUNA MOHAMED, AMINA HARUN, and MOHAMUD A. MOHAMED,

Plaintiffs,

v.

ABRAHAM LINCOLN HIGH SCHOOL, THE INSTITUTE FOR NEW AMERICANS, and SPECIAL SCHOOL DISTRICT NO. 1,

Defendants,

SPECIAL SCHOOL DISTRICT NO. 1,

Third-Party Plaintiff,

v.)
)
METROPOLITAN FEDERATION)
OF ALTERNATIVE SCHOOLS, INC.,)
)
Third-Party Defendant.)
)

ORDER

Daniel R. Shulman, GRAY PLANT MOOTY MOOTY & BENNETT, PA; Robert J. Kolstad; R. Travis Snider, SNIDER LAW FIRM, LTD.; David L. Shulman, LAW OFFICE OF DAVID SHULMAN, PLLC, for plaintiffs.

Paula Weseman Theisen and Sarah R. Schmitz, MEAGHER & GEER, P.L.L.P., for defendants Abraham Lincoln High School and Institute for New Americans.

Sonya J. Guggemos, Margaret A. Skelton, and Kimberley K. Sobieck, RATWIK, ROSZAK & MALONEY, P.A., for defendant/third-party plaintiff Special School District No. 1.

Susan M. Tindal and Jon K. Iverson, IVERSON REUVERS, LLC, for third-party defendant Metropolitan Federation of Alternative Schools, Inc.

Plaintiffs are a group of thirteen young men and women who were once students at defendant Abraham Lincoln High School ("Lincoln"). Lincoln, a public alternative high school in Minneapolis, was

established to serve foreign-born students with limited English skills and little formal education. When plaintiffs attended Lincoln, it was run by defendant Institute for New Americans ("the Institute") under an arrangement between third-party defendant Metropolitan Federation of Alternative Schools ("MFAS") and defendant/third-party plaintiff Special School District No. 1 ("District 1"), the entity that runs the Minneapolis public schools.

Plaintiffs contend that they were badly educated and discriminated against at Lincoln in violation of two federal laws and one state law: the Equal Educational Opportunity Act of 1974 ("EEOA"), which requires schools and school districts to make efforts to overcome language barriers faced by students, 20 U.S.C. § 1703(f); Title VI of the Civil Rights Act of 1964, which prohibits recipients of federal funding from discriminating on the basis of, among other things, national origin, 42 U.S.C. § 2000d; and the Minnesota Human Rights Act ("MHRA"), which likewise bars national-origin discrimination, Minn. Stat. § 363A.13.

The Institute and District 1 move for summary judgment, as does MFAS. For the reasons that follow, the Court grants the Institute's and District 1's motions. As a result of this ruling, District 1's third-party complaint against MFAS, in which District 1 seeks recovery against MFAS if District 1 is held liable to plaintiffs, is now moot. The Court therefore denies MFAS's motion for summary judgment without addressing its merits.

I. BACKGROUND

The underlying facts are set forth in the Court's March 13, 2006 order on defendants' motions to dismiss [Docket No. 36]. *Mumid v. Abraham Lincoln High Sch.*, Civ. No. 05-2176, 2006 WL 640510, 2006 U.S. Dist. LEXIS 9967 (D. Minn. Mar. 13, 2006).[1] The parties largely agree on the facts, but to the extent that the parties disagree, the Court recounts the facts in the light most favorable to plaintiffs.

Lincoln was established in the late 1990s by the Institute, a nonprofit corporation. Inst. Mem. Supp. Mot. S.J. ("Inst. SJ Mem.") at 6 [Docket No. 136]; Inst. Ex. 46 at 2 Req. 3 [Docket No. 119]. Lincoln itself is not a legal entity; rather, it is essentially a trade name of the Institute, which operates Lincoln. *See* Inst. SJ Mem. at 6; Giles Aff. ¶ 6 [Docket No. 129]. The Court will therefore sometimes refer to Lincoln and the Institute collectively as "Lincoln."

The Institute is a member of another nonprofit entity, third-party defendant MFAS. Inst. Ex. 46 at 2 Req. 3. MFAS is an umbrella organization whose members operate public alternative schools. MFAS Mem. Supp. Mot. Partial S.J. ("MFAS SJ Mem.") at 3 [Docket No. 112]. From 1997 through 2003, District 1 contracted with the Institute indirectly, through MFAS. During that period, District 1 had an arrangement with MFAS whereby MFAS's members (such as the Institute) would operate alternative

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[1] The March 13, 2006 order was entered by Judge Ann D. Montgomery, to whom this case was assigned before being transferred to the undersigned.

schools (such as Lincoln) on behalf of District 1. Inst. Exs. 24-25. Beginning in mid-2003, District 1 contracted directly with the Institute for the education of students at Lincoln. Inst. Exs. 26-28.[2] Since mid-2007, when Lincoln became a public charter school funded by the State of Minnesota, District 1 has not had any authority, direct or indirect, over Lincoln. Giles Aff. ¶ 7.

Plaintiffs are thirteen students who attended Lincoln between 1999 and 2006.[3] Nine plaintiffs were born in Somalia, and four in Ethiopia. All thirteen plaintiffs fled their native countries and lived for some time in Kenyan refugee camps before immigrating to the United States. Most plaintiffs were in their mid- to late teens when they immigrated, though one (Muna Mohamed) was as young as fourteen and another (Maymuna Muktar Osman) was as old as twenty. At the time of their enrollment at Lincoln, plaintiffs had varying, but generally low-to-nonexistent, levels of formal schooling and familiarity with the English language.

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[2] In 2006, Lincoln changed its name to "Lincoln International High School," and for the 2006-2007 school year, District 1 contracted directly with an entity by that name, not with the Institute. Inst. Ex. 28. The parties have not, however, argued that this should have any impact on this litigation.

[3] The information in this section about the individual plaintiffs is taken from District 1's opening summary-judgment brief. Plaintiffs acknowledge that District 1's brief correctly sets forth this information. Pl. Mem. Opp. Defs. Mots. S.J. ("Pl. SJ Opp.") at 31 n.5 [Docket No. 137].

In Minnesota, students cannot graduate from high school unless they accumulate enough credits of course work and pass certain state-mandated tests. When plaintiffs attended Lincoln, the required tests were the Basic Skills Tests ("BSTs") in reading, writing, and mathematics.[4]

Two plaintiffs passed the BSTs (Amal Mohamed and Yurub Siyad) after receiving disability-related accommodations from the state; two other plaintiffs (Amina Harun and Mohamud Mohamed) passed the BSTs without receiving any accommodations. All four of these plaintiffs graduated from Lincoln. One more plaintiff (Maymuna Muktar Osman) graduated from Lincoln; it is not clear from the parties' briefing whether she passed the BSTs or (as sometimes happens) was exempted from doing so. The remaining eight plaintiffs did not graduate from Lincoln; seven of these eight failed all portions of the BSTs, while one (Muna Mohamed) passed the mathematics portion of the tests but failed the reading and writing portions. Several of the plaintiffs were allowed to remain enrolled at Lincoln past their twenty-first birthdays, despite the fact that Lincoln received no public funding for students after they turned twenty-one. Mpls. Pub. Sch. Mem. Supp. Mot. S.J. ("Dist. 1 SJ Mem.") at 6, 11-25 [Docket No. 128].

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[4] Minnesota has since replaced the BSTs with tests called the "Graduation-Required Assessments for Diploma" or "GRAD" tests. Students who started eighth grade in 2005-06 or afterwards must take the GRAD tests rather than the BSTs. Minn. Dep't of Educ., "BST," http://education.state.mn.us/MDE/Accountability_Programs/Assessment_and_Testing/Assessments/BST/index.html (last visited June 11, 2008).

Plaintiffs criticize Lincoln for its poor curriculum, its underqualified teachers, its failure to assess students' progress, its placement of students in a program (so-called Level 9B) that provided little educational benefit and effectively guaranteed that the students would not graduate, its failure to assess whether students needed special-education services, and its failure to provide such services when needed. Pl. Mem. Opp. Defs. Mots. S.J. ("Pl. SJ Opp.)" at 5-18, 21-31 [Docket No. 137]. According to plaintiffs, Lincoln's shortcomings amounted to intentional discrimination against them on the basis of their national origin. *Id.* at 1 ("The evidence of record in this case establishes that defendants collectively were responsible for the establishment and operation of a substandard high school that essentially warehoused immigrant students until they aged out of the school system without even the rudiments of an adequate education, solely because they were immigrants."). Plaintiffs also argue that because of the school's many flaws, Lincoln failed to provide them an education designed to overcome language barriers as mandated by the EEOA. *Id.*

With respect to the curriculum, plaintiffs deny that Lincoln had a coherent curriculum of any kind. *Id.* at 6-7. They further argue that if such a curriculum existed, it was unsound. *Id.* at 27-28. Specifically, plaintiffs allege that Lincoln's instruction was a form of "English immersion" and that immersion is not an effective approach for students like plaintiffs. *Id.* For its part, Lincoln counters that it did have an appropriate curriculum, which was based on a "sheltered English" model of instruction. Inst. Reply Mem. Supp. Mot. S.J. ("Inst. Reply") at 2-5 [Docket No. 145]. But plaintiffs' educational expert, Martha

Bigelow, supports their contentions that Lincoln's curriculum was both insufficiently developed and poorly suited to Lincoln's student population. Inst. Ex. 21.[5]

Plaintiffs also present evidence that teachers and the principal at Lincoln were underqualified because they lacked necessary credentials. Pl. SJ Opp. at 8-9; Inst. Ex. 21 at 16-18. The Institute counters by alleging that plaintiffs looked for licensing data in the wrong place and therefore erroneously concluded that some state-licensed teachers were unlicensed. Inst. Reply at 6-8. Thus there appears to be a dispute of fact over the credentials of Lincoln's teachers and its principal. For summary-judgment purposes, the Court assumes that at least some of the teachers at Lincoln lacked proper teaching credentials.

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[5] Bigelow concluded her report this way:

> I have found much evidence that [Lincoln] failed to overcome students' English language learning needs to allow them to participate in the educational program offered by the school district. They failed in multiple and intersecting ways as they chose program models, assessment tools/procedures and instructional approaches that were not well suited to their unique student population. Unprepared and unsupported teachers, counselors and aid[e]s were left under the guidance of unprepared administrators. Immigrant students at [Lincoln] deserved much more. Their need for an education was crucial and now they are left, again, after already having their education delayed or interrupted, to make up for lost time on their own. It should not have been this way for our newest Minnesotans.

Inst. Ex. 21 at 24.

Plaintiffs' criticisms about special-education testing and services are borne out, in part, by a report issued in June 2005 by the Minnesota Department of Education ("MDE") after the department investigated a student's complaints about how Lincoln treated students with disabilities. Shulman Aff. Ex. A [Docket No. 138].[6] The MDE found that under one percent of Lincoln's student population in 2004-2005 was receiving special-education services. *Id.* at 4. The MDE further found that students at Lincoln were required to wait at least one year after enrolling in Lincoln before Lincoln or District 1 would evaluate them for special-education services — and that, in general, students were not evaluated until they had received at least three years of "English Language Learners" (or "ELL") instruction (i.e., instruction in the English language for non-native speakers). *Id.* at 9 ¶ 15.

District 1 and Lincoln do not deny that it was their policy to defer assessing students at Lincoln for special-education services until the students had received three years of ELL instruction. The MDE report on which plaintiffs rely, however, says that this policy was based on District 1's belief that special-education assessments would not be reliable if they were done any earlier because some part of a student's assessment results might be attributable to English-language deficiencies rather than genuine special-education needs. *Id.* The MDE, however, found that District 1 and Lincoln's policy of delaying assessment for three years was impermissible under state and federal regulations. *Id.* at 11. The MDE also

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[6] Lincoln and District 1 have not challenged this report's admissibility.

found that Lincoln and District 1 violated state regulations by not developing adequate remediation plans for students who failed the BSTs. *Id.*

II. ANALYSIS

A. Standard of Review

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute over a fact is "material" only if its resolution might affect the outcome of the suit under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute over a fact is "genuine" only if the evidence is such that a reasonable jury could return a verdict for either party. *Ohio Cas. Ins. Co. v. Union Pac. R.R.*, 469 F.3d 1158, 1162 (8th Cir. 2006). In considering a motion for summary judgment, a court "must view the evidence and the inferences that may be reasonably drawn from the evidence in the light most favorable to the non-moving party." *Winthrop Res. Corp. v. Eaton Hydraulics, Inc.*, 361 F.3d 465, 468 (8th Cir. 2004).

B. Title VI and MHRA Claims

Title VI of the Civil Rights Act of 1964 forbids discrimination by recipients of federal funding. Specifically, § 2000d of Title 42 of the United States Code provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any

program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. The MHRA contains an even broader prohibition on discrimination by educational institutions.[7] Minn. Stat. § 363A.13. Plaintiffs contend that Lincoln and District 1 violated 42 U.S.C. § 2000d and the MHRA by discriminating against them because they were not born in the United States.

District 1 and Lincoln concede that they are subject both to the MHRA and, because they received federal

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[7] The MHRA provides in part:

> It is an unfair discriminatory practice to discriminate in any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby to any person because of race, color, creed, religion, national origin, sex, age, marital status, status with regard to public assistance, sexual orientation, or disability, or to fail to ensure physical and program access for disabled persons.

Minn. Stat. § 363A.13 subd. 1.

The parties agree that plaintiffs' MHRA claims should be analyzed under the same legal standards as plaintiffs' Title VI claims. Dist. 1 SJ Mem. at 48-49; Pl. SJ Opp. at 63; *see also Brantley ex rel. Brantley v. Indep. Sch. Dist. No. 625*, 936 F. Supp. 649, 657 n.16 (D. Minn. 1996). Accordingly, the Court will focus primarily on Title VI.

The parties also agree that the MHRA claims of eleven plaintiffs are untimely (those of Ibrahim Mumid, Fadumo Muse, Fahmo Ahmed, Safiya Mohamed, Iftu Jibril, Maymuna Muktar Osman, Misbah Ibrahim, Shamsa Ali Mohamed, Yurub Siyad, Muna Mohamed, and Amina Harun). *See* Dist. 1 SJ Mem. at 47-48; Tr. Oral Arg. Jan. 3, 2008. The MHRA claims of those plaintiffs are therefore dismissed for that reason, in addition to being dismissed on the merits.

funding, to § 2000d. But they argue that plaintiffs have no evidence that either defendant *intentionally* discriminated against plaintiffs. At most, say defendants, plaintiffs have evidence that District 1's and Lincoln's actions had a *disparate impact* on plaintiffs because of their national origin. Dist. 1 Reply Mem. Supp. S.J. Mot. at 6 [Docket No. 150]; Inst. SJ Mem. at 45.

The Court agrees with District 1 and Lincoln. The facts, viewed in the light most favorable to plaintiffs, support, at most, a disparate-impact claim. It is settled law that disparate-impact claims cannot be brought under Title VI; rather, Title VI prohibits only intentional discrimination. *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001). Thus, to establish a Title VI violation, a plaintiff must prove that a defendant's challenged actions were rooted in discriminatory animus — in a subjective intent to discriminate.

In general, there are two different methods of proving intentional discrimination: the direct method and the indirect method. *See Rogers v. City of Chicago*, 320 F.3d 748, 753-54 (7th Cir. 2003); *Haywood v. Lucent Techs., Inc.*, 323 F.3d 524, 529 (7th Cir. 2003); *Darke v. Lurie Besikof Lapidus & Co.*, 550 F. Supp. 2d 1032, 1040-41 (D. Minn. 2008). Under the direct method, a plaintiff with strong evidence of a defendant's discriminatory intent, such as discriminatory statements by key decision makers, may rely on that strong evidence to directly establish intentional discrimination. *See Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004); *Darke*, 550 F. Supp. 2d at 1041 ("[T]he direct method applies when the plaintiff . . . has strong evidence of discrimination."). The indirect method, available to

plaintiffs with weaker evidence of discriminatory intent, is based on the familiar three-step framework described in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). *Darke*, 550 F. Supp. 2d at 1041 ("[W]hen the plaintiff's evidence is weaker, *McDonnell Douglas* gives the Court a framework for analyzing whether the evidence is nevertheless sufficient to support a verdict of discrimination.").

To the extent that plaintiffs have any evidence of intentional discrimination by either Lincoln or District 1, that evidence is quite weak. And, as explained below, that weak evidence is insufficient for a jury to find that either defendant intentionally discriminated. Although a reasonable jury could perhaps find that District 1's and Lincoln's actions produced a disparate impact on plaintiffs because plaintiffs received a substandard education compared to United States-born students, a reasonable jury could not find that either District 1 or Lincoln intentionally discriminated against plaintiffs — that is, provided a poor education to them *because* of their national origin.

The Court therefore grants summary judgment to defendants on plaintiffs' Title VI and MHRA claims. Because the Court's analysis with respect to Lincoln differs slightly from its analysis with respect to District 1, the Court discusses each defendant separately.

1. Lincoln

Plaintiffs in this case do not have strong evidence of intentional discrimination by Lincoln. Indeed, the record contains only a single statement by a single teacher at Lincoln that could be interpreted as

reflecting animus against plaintiffs based on their national origin: After some students circulated a petition criticizing a teacher at Lincoln, another teacher wrote, "I am certain that students would never dare try something like this in their home country, and it shouldn't be allowed here." Shulman Aff. Ex. KK. This single statement by a single teacher is not nearly enough for a jury to conclude that Lincoln, as an institution, intentionally discriminated against plaintiffs.

Indeed, although plaintiffs contend that there is direct evidence of discrimination, their argument is based almost entirely on evidence of the *impact* of Lincoln's educational system on plaintiffs. Pl. SJ Opp. at 63-67. Plaintiffs assert, correctly, that Lincoln was "intentionally created . . . to accommodate students who were not native-born." *Id.* at 64. Plaintiffs then appeal to the "axiomatic" proposition "that persons intend the consequences of their actions." *Id.* at 63. With that proposition in mind, plaintiffs contend:

> Since [the Institute] established and operated [Lincoln] only for immigrant students, but then failed to educate them, [Lincoln] by design knew and intended that its unlawful conduct would affect only immigrant, foreign-born students, and not American-born, non-immigrant students. It created and maintained a substandard facility and program for immigrants, something [the Institute] knew would never be permitted for mainstream, non-immigrant students. Because [the Institute] knew it was dealing with a non-English speaking immigrant population, the record clearly supports an inference that [the

> Institute] believed it could get away with doing less for this group of immigrants than for a non-immigrant population. This is the essence of discrimination.

Id. at 64-65.

As this passage makes clear, plaintiffs contend that they were badly educated at Lincoln. The Court assumes, for summary-judgment purposes, that this is true. But the substandard education that plaintiffs received is an *effect* of the educational policies and practices of Lincoln, and although that effect was felt only by foreign-born students, it does not follow that Lincoln intentionally discriminated against such students. Put simply, not every disparate impact reveals discriminatory intent; if it did, the distinction between disparate-impact claims and intentional discrimination claims would evaporate.

In this case, it is theoretically possible that Lincoln deliberately set out to provide a poor education to foreign-born students as a way of harming them. There is no evidence of this, however, and it is at least equally possible that Lincoln educated its students badly as a result of incompetence, not animus. Incompetence that happens to burden only members of a protected class is not, by itself, evidence of discriminatory animus.

Suppose, for example, that a former professional baseball player volunteers to coach a Little League team made up entirely of African-American boys. And suppose further that the former player — an African-American himself — turns out to be a terrible coach. The *impact* of the terrible coaching would be felt

only by African-Americans. But that does not mean that the former player provided terrible coaching because of animus toward African-Americans. He might have had positive feelings toward African-Americans and sincerely wanted to *help* them — indeed, that may have been why he volunteered to coach a team of African-American boys — but simply turned out to be an incompetent coach. Likewise Lincoln may have had positive feelings toward foreign-born students and sincerely wanted to *help* them, but simply turned out to be a substandard school.

Lacking strong evidence of discriminatory intent on Lincoln's part, plaintiffs could — if this were an ordinary case — rely upon the three-part *McDonnell Douglas* framework to attempt to establish that Lincoln intentionally discriminated against them. *See McDonnell Douglas*, 411 U.S. at 802-03; *Elnashar v. Speedway SuperAmerica, LLC*, 484 F.3d 1046, 1055 (8th Cir. 2007); *Fuller v. Rayburn*, 161 F.3d 516, 518 (8th Cir. 1998) (discussing applicability of *McDonnell Douglas* in Title VI cases). Under *McDonnell Douglas*, a plaintiff must first establish a prima facie case of discrimination. If the plaintiff does so, the defendant has the burden of coming forward with a legitimate, nondiscriminatory explanation for its challenged actions. The plaintiff must then put forward sufficient evidence for a jury to find that the defendant's proffered nondiscriminatory explanation is pretextual. *See Elnashar*, 484 F.3d at 1055; *Darke*, 550 F. Supp. 2d at 1042.

Plaintiffs cannot, however, establish a prima facie case against Lincoln because of the unusual facts of this case, as the Court observed in its March 13, 2006

order. *Mumid*, 2006 WL 640510, at *4 ("In this case, it is not possible for similarly situated people to be treated differently because Plaintiffs allege that all students are members of the same protected class."). To establish a prima facie case of intentional discrimination, a plaintiff must show that (1) he belongs to a protected class; (2) he suffered adverse action; and (3) a similarly situated person (or persons) outside of the protected class — called a "comparator" — did not suffer the challenged adverse action. In this case, with respect to Lincoln, there are no comparators: Lincoln served *only* members of the protected class (foreign-born students); it did not serve any students outside of the protected class.

Given the absence of comparators in this case, the *McDonnell Douglas* framework cannot be applied. Indeed, plaintiffs implicitly acknowledge the inapplicability of the *McDonnell Douglas* framework by choosing not to rely on it in their brief opposing defendants' summary-judgment motion. Instead, they argue that a jury could infer discriminatory intent from the fact that Lincoln provided a substandard education to foreign-born students and no one else. Pl. SJ Opp. at 63-67. For the reasons already explained, the Court finds that no reasonable jury could find, based on the record, that discriminatory animus motivated Lincoln's actions.

2. District 1

Plaintiffs argue, as they do with respect to Lincoln, that a jury could infer discriminatory animus on District 1's part from the fact that Lincoln — under contract to District 1 — provided a substandard education to a population made up entirely of

foreign-born students. Pl. SJ Opp. at 67. This argument is no stronger with respect to District 1 than with respect to Lincoln. Thus, for the reasons given above, plaintiffs cannot establish District 1's discriminatory intent by the direct method of proof.

District 1, however, differs from Lincoln in that District 1 serves both native-born and foreign-born students. And plaintiffs have evidence that District 1's policy with respect to testing for special education differed for the two groups of students. Specifically, District 1 had a general policy of refusing to test foreign-born students for special-education services until they had been enrolled in ELL classes for three years. Shulman Aff. Ex. A at 9 ¶ 15. Under the *McDonnell Douglas* framework, this policy supports a prima facie case of discrimination: Plaintiffs are members of a protected class (foreign-born students); that class was subject to adverse action because its members were denied special-education testing until they had taken three years of ELL classes; and non-class members (native-born students) did not suffer the adverse action but rather were offered special-education testing as needed.

District 1 is nonetheless entitled to summary judgment on plaintiffs' discrimination claim with respect to special-education testing for two reasons. First, eleven of thirteen plaintiffs have no evidence that they personally suffered any injury from District 1's testing policy. Second, plaintiffs' claim does not satisfy the *McDonnell Douglas* framework because District 1 has offered a legitimate, nondiscriminatory explanation for its policy and plaintiffs have no evidence from which a jury could conclude that the explanation is pretextual.

There is no dispute that District 1 had a general policy of refusing to test foreign-born students for special-education services until the students had taken three years of ELL classes. But the only students who were injured by policy were those who were in need of testing for special education. Plaintiffs have offered two types of evidence to support their contention that all thirteen of them needed special-education testing, but a reasonable jury could conclude from that evidence that, at most, only two plaintiffs were in need of such testing.

First, plaintiffs point out that one teacher at Lincoln said that four plaintiffs needed special education. Pl. SJ Opp. at 68; Shulman Aff. Ex. TT. But the teacher did not identify the particular plaintiffs he had in mind, and in any event, there is no evidence that the teacher knew what he was talking about — that is, there is no evidence that he was qualified to assess special-education needs generally or that he had enough information about the four (unnamed) plaintiffs to assess their particular needs. Second, plaintiffs point out that two of them — Amal Mohamed and Yurub Siyad — were granted accommodations under § 504 plans. Pl. SJ Opp. at 69. Such plans are developed for students with disabilities, and a reasonable jury could find, based on the existence of those plans, that District 1 should have assessed the needs of these two plaintiffs for special-education services earlier than it did. But a reasonable jury could not find that any of the other eleven plaintiffs was deprived of special-education testing that he or she should have received.

As to the two plaintiffs who may have been harmed, however, there is no evidence that District 1's

explanation for its policy of delaying special-education testing is a pretext for discrimination. Accordingly, Amal Mohamed and Yurub Siyad, like the other eleven plaintiffs, cannot prevail on their Title VI claims against District 1.

The evidence shows that District 1 adopted its policy with respect to special-education testing because it did not believe that it could reliably assess whether a student needed special-education services until the student had been in the country long enough to learn English. Shulman Aff. Ex. A at 9 ¶ 15. The wisdom of District 1's policy was doubtful, and the MDE required District 1 to abandon the policy because it violated state and federal regulations. *Id.* at 11-13. But for *McDonnell Douglas* purposes, the reasons for District 1's policy need not have been *wise*; they need only have been *sincere* (and nondiscriminatory). District 1's explanation is indeed nondiscriminatory, and plaintiffs have offered no evidence that it is pretextual. Plaintiffs have thus failed to create a question of fact as to District 1's discriminatory intent.

C. EEOA Claims

Section 1703 of Title 20 of the United States Code, a provision of the EEOA, forbids states to "deny equal educational opportunity to an individual on account of his or her . . . national origin" by engaging in various practices. 20 U.S.C. § 1703. Subsection (a) forbids "deliberate segregation" and subsection (c) forbids assigning students to schools outside their neighborhoods if doing so would increase the degree of segregation in the school system. *Id.* §§ 1703(a), (c). Although Count 4 of plaintiffs' second amended complaint raises segregation- and assignment-based

claims under §§ 1703(a) and (c), plaintiffs conceded at oral argument that the evidence does not support either type of claim. Rather, the evidence shows that each plaintiff chose to attend Lincoln; District 1 did not assign them there or otherwise segregate them. The Court therefore grants summary judgment to defendant District 1 on Count 4.[8]

Plaintiffs bring their remaining EEOA claim, in Count 1 of the second amended complaint, under § 1703(f). Section 1703(f) identifies "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs" as a prohibited practice under the EEOA. 20 U.S.C. § 1703(f). Put another way, § 1703(f) imposes an affirmative obligation on state school systems to "take appropriate action to overcome language barriers . . . ." *Id.*

Whether District 1 took "appropriate action to overcome language barriers" facing students at Lincoln

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[8] Also at oral argument, in response to a question from the Court about why only District 1 was named as a defendant on plaintiffs' EEOA claims, plaintiffs moved to amend their complaint to assert EEOA claims against Lincoln and the Institute. Defendants pointed out, however, that plaintiffs had asserted EEOA claims against the Institute in an earlier version of the complaint and, after defendants moved to dismiss, plaintiffs amended the complaint to remove those claims. Accordingly, for several reasons -- because by its terms § 1703 applies only to states; because defendants dropped EEOA claims after plaintiffs moved to dismiss; because defendants did not move to amend until the summary-judgment hearing; because amendment would be futile in light of the Court's ruling on the EEOA claim against District 1 — the court denies plaintiffs' oral motion to amend.

is, on the record before the Court, a disputed question of fact. Plaintiffs offer expert testimony that Lincoln used an "English immersion" curriculum that was pedagogically unsound in theory and badly implemented in practice. Inst. Ex. 21. District 1 responds by criticizing various aspects of plaintiffs' expert report. Dist. 1 SJ Mem. at 36-42. The Court recognizes the force of some of District 1's criticisms, but the Court nonetheless finds that plaintiffs' evidence suffices to create a jury question as to the appropriateness of District 1's efforts to overcome plaintiffs' language barriers.

District 1 is, however, entitled to summary judgment for a different reason: Plaintiffs' injuries, if any, are not redressable by this Court. Plaintiffs seek both injunctive and monetary relief. But, as is explained below, monetary relief is not available for violations of the EEOA, and the injunctive relief sought by plaintiffs would do nothing to redress their injuries. Redressability is an element of standing, which is a prerequisite to this Court's subject-matter jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Hall v. LHACO, Inc.*, 140 F.3d 1190, 1195-96 (8th Cir. 1998). This Court therefore lacks subject-matter jurisdiction over plaintiffs' EEOA claims because plaintiffs lacks standing to bring them.

1. Injunctive Relief

Plaintiffs seek an injunction that would either (1) forbid Lincoln from engaging in any practices found to be unlawful or (2) shut Lincoln down entirely. Second Am. Compl. at 19-20 ¶¶ D, F [Docket No. 70]. But no plaintiff will ever again be a student at Lincoln. Five plaintiffs — Maymuna Muktar Osman, Mohamed

Amal, Yurub Siyad, Amina Harun, and Mohamud Mohamed — have already graduated. The remaining eight plaintiffs are now too old to attend Lincoln or any other public high school.

Because no plaintiff will ever again attend Lincoln, any injunctive relief requiring Lincoln to change its practices or shut its doors will have no impact whatsoever on the plaintiffs. By definition, then, the injunctive relief sought by plaintiffs cannot redress their injuries, and thus plaintiffs do not have standing to seek that injunction. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 106 n.7 (1983) (holding that plaintiff lacked standing to seek an injunction against the Los Angeles police department's choke-hold policy because he could not "credibly allege that he faced a realistic threat from the future application" of the policy); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 184-85 (2000) (discussing *Lyons*). Plaintiffs therefore lack standing with respect to their claims for injunctive relief (as they effectively conceded at the summary-judgment hearing).

2. Money Damages

Section 1712 of Title 20 provides that "[i]n formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court . . . shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws." 20 U.S.C. § 1712. The plain language of this provision signals that Congress intended to limit the remedies that courts could impose for violations of the EEOA: Again, courts can impose "*only* such remedies

as are *essential* to *correct*" a particular violation of the EEOA. *Id.* (emphasis added). But § 1712 provides no explicit guidance as to whether or when money damages can qualify as an "essential" remedy.

Plaintiffs appeal to the general principle that when Congress creates a cause of action (as it has in the EEOA), courts should presume that all remedies are available, including money damages. Pl. SJ Opp. at 70-71 (quoting *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 66 (1992)). Because Congress did not forbid the award of money damages under the EEOA, argue plaintiffs, damages must be available in a case like this one, in which an injunction would not redress the plaintiffs' grievances.

Plaintiffs have not, however, cited a single case in which a court awarded money damages for an EEOA violation. It would be extraordinary if money damages were available under the EEOA, but, in the thirty-four-year history of the statute, no plaintiff had yet managed to be awarded such damages. Further, it would be extraordinary if Congress had authorized money damages under the EEOA given the potential for such awards to bankrupt school districts. In the absence of any authority for plaintiffs' position, and in light of the overall statutory scheme of the EEOA, the Court declines to become the first federal district court ever to allow a suit for money damages under the EEOA.[9]

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[9] It is possible that the equitable remedies of compensatory education or tuition reimbursement might be available under § 1703(f). In cases under the Individual with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1482, and its predecessor statutes, courts have held that such remedies are

Awarding money damages under the EEOA would not only be unprecedented, but it would also be inconsistent with the tenor of the statute's remedy-related provisions. First, § 1712 itself authorizes only remedies that "are *essential* to *correct*" a particular violation of the EEOA. 20 U.S.C. § 1712 (emphasis added). Money damages can *compensate* a person for harm that she has suffered, but compensating for a wrong is different from "correcting" it. The word "correct" in § 1712 suggests that remedies under the EEOA are equitable in nature and are designed to change specific practices that violate the statute rather than to compensate victims. Indeed,

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available and, even if they involve the payment of money, are equitable in nature. *Miener v. Missouri*, 800 F.2d 749, 754 (8th Cir. 1986) ("[T]he plaintiff is entitled to recover compensatory educational services if she prevails on her claim that the defendants denied her a free appropriate education in violation of the [Education of the Handicapped Act, a predecessor or the IDEA]."); *S.V. v. Sherwood Sch. Dist.*, 75 F. Supp. 2d 1153, 1157 (D. Or. 1999) ("Compensatory education, like retroactive tuition reimbursement, requires the school district to belatedly pay expenses that it should have paid all along[.] Unlike tuition reimbursement, however, compensatory education is a prospective remedy that allows a disabled student to continue education beyond age 21 in order to make up for the earlier deprivation of a free appropriate public education. Both claims, tuition reimbursement and compensatory education, are equitable remedies similarly intended to secure a disabled student's right to a free appropriate public education.")(quotations omitted), *rev'd on other grounds*, 254 F.3d 877 (9th Cir. 2001).

But plaintiffs have not asked for either compensatory educational services or tuition reimbursement, nor have they briefed the question whether such remedies are available under the EEOA. The theoretical availability of such remedies therefore does not provide a basis for the Court to deny summary judgment.

commentators seem to assume that § 1712 authorizes only equitable remedies. *See* 6 Fed. Proc., L. Ed. § 11:407 (West 2008) ("The scope of a trial court's equitable powers to remedy past wrongs in school-desegregation cases is broad, for breadth and flexibility are inherent in equitable remedies.").

Further, the EEOA's remedy provisions are directed explicitly at equitable remedies such as busing, not at money damages. Sections 1712 through 1718 of Title 20, enacted as §§ 213 to 219 of the EEOA, make up the entire "Remedies" subsection of the EEOA. *See* Equal Educational Opportunites Act of 1974, Subpart 4, Pub. L. No. 93-380, 88 Stat. 484, 516-18. Sections 1713 through 1718 give no hint that money damages are available under the EEOA; to the contrary, they focus on equitable remedies.

Section 1713, for example, entitled "Priority of remedies," requires courts to give preference to certain types of equitable remedies (e.g., assigning students to nearby schools, 20 U.S.C. § 1713(a)-(b)) over others (e.g., constructing magnet schools, 20 U.S.C. § 1713(f)). An award of money damages is not among the remedies listed in § 1713, which governs "formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, which may involve directly or indirectly the transportation of students . . . ." 20 U.S.C. § 1713.

Unfortunately, the reach of § 1713 is not entirely clear, and it likely applies only to certain remedies — those that "may involve directly or indirectly the transportation of students . . . ." *Id.* The reach of § 1713 depends on whether the relative clause "which may involve directly or indirectly the transportation of

students" is a restrictive or nonrestrictive modifier of the noun "remedy."[10] That is, does § 1713 govern *only* remedies that "may involve directly or indirectly the transportation of students," but not other kinds of remedies (i.e., is the phrase beginning "which may involve" restrictive)? Or does § 1713 govern *any* remedy under the EEOA, some of which may happen to involve the transportation of students (i.e., is the phrase beginning "which may involve" nonrestrictive)? Section 1713 is *punctuated* as if the phrase "which may involve" is nonrestrictive — the phrase is preceded by a comma, and this is the conventional way of marking

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[10] A "restrictive relative clause" is a clause that, as the name suggests, limits in an essential way (i.e., restricts) the reach of what it modifies (i.e., what it is "relative" to). *See* Bryan A. Garner, *Garner's Modern American Usage* 782 (2003) (entry on "that"). By contrast, a "nonrestrictive relative clause" provides nonessential information about what it modifies; it is basically an aside. *Id.*

Modern grammarians prefer the terms "integrated" and "nonintegrated" over the traditional terms "restrictive" and "nonrestrictive," but the difference is mainly terminological, not substantive. Rodney Huddleston & Geoffrey K. Pullum, *Cambridge Grammar of the English Language* ch. 12 § 2.2 at 1034-35 (2002) ("Integrated relatives are so called because they are integrated into the construction containing them. . . . The prototypical integrated relative serves to restrict the denotation of the head nominal it modifies, and is often referred to by the term 'restrictive relative.'"). One could also use the less formal terms "defining" (for "restrictive" or "integrated") and "non-defining" (for "nonrestrictive" or "nonintegrated"). *See* Kingsley Amis, *The King's English* 226 (St. Martin's Griffin 1999).

a "which" clause as nonrestrictive.[11] But the remedies listed in § 1713 all relate to the geographic distribution of students and schools, and it therefore makes sense that the listed remedies would relate only to remedies *that* (restrictive) may involve the transportation of students.[12]

Nonetheless, even if § 1713 applies only to remedies that may involve the transportation of students and

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[11] *See* Garner, *Garner's Modern American Usage* 782; Wilson Follett, *Modern American Usage* 322 (Jacques Barzun ed., Avenel Books 1980) (entry on "that, which").

[12] Many writers on English usage discourage the use of "which" to introduce restrictive relative clauses, advocating instead that "which" should be used only to introduce nonrestrictive relative clauses and that "that" should be used to introduce all restrictive relative clauses. *See, e.g.*, Garner, *Garner's Modern American Usage* 782-83; Amis, *The King's English* 225-27; Follett, *Modern American Usage* 321-25; H.W. Fowler, *Dictionary of Modern English Usage* 625-28 (Ernest Gowers ed., 2d ed. 1965) (entry on "that, rel. pron."). There is no doubt, however, that — as a descriptive matter — many of the best writers of English prose often use "which" to introduce restrictive relative clauses. *See Webster's Dictionary of English Usage* 894-96 (Merriam-Webster 1989) (entry on "that"); Follett, *Modern American Usage* 321-25.

There is, however, good reason to prefer using "that" rather than "which" to introduce restrictive relative clauses, as the discussion in the text illustrates: Sometimes it is unclear whether a "which" clause is intended to be restrictive or nonrestrictive, particularly when the clause is preceded by a comma. *See* Amis, *The King's English* 227 ("Confusions may arise when the writer becomes nervous of the length of his defining clause and puts in a pair of commas that make the clause seem like a non-defining one . . . ."). Because "that" cannot be used to introduce nonrestrictive relative clauses, a "that" clause is always unambiguously restrictive.

not to other remedies, the remaining remedy-related provisions of the EEOA focus exclusively on equitable remedies, not money damages. Section 1714 is entitled "Transportation of students" and governs just that. 20 U.S.C. § 1714. Section 1715, titled "District lines," specifies the circumstances under which the boundaries of school districts can be disregarded in formulating remedies for EEOA violations. 20 U.S.C. § 1715. Section 1716 provides that school districts can adopt voluntary desegregation plans. 20 U.S.C. § 1716. Section 1717 allows parents and school districts to challenge busing orders and desegregation plans if "the time or distance of travel" for a student is excessive. 20 U.S.C. § 1717. And § 1718 governs the termination of "[a]ny court order requiring, directly or indirectly, the transportation of students for the purpose of remedying a denial of the equal protection of the laws . . . ." 20 U.S.C. § 1718.

As noted above, money damages would not "correct" (but would merely compensate for) a violation of the EEOA, and therefore the plain text of § 1712 does not seem to authorize a remedy of money damages. This conclusion is reinforced by §§ 1713 through 1718, which — taken with § 1712 — indicate that Congress intended to authorize only equitable remedies under the EEOA. Because plaintiffs are entitled to neither money damages nor an injunction, the Court holds that plaintiffs lack standing to bring their EEOA claims because their injuries, if any, are not redressable.

D. MFAS's Third-Party Complaint

In its third-party complaint, District 1 brings claims of contribution and indemnification against MFAS, seeking recovery from MFAS for any damages District 1 may be ordered to pay plaintiffs. MFAS moves for partial summary judgment based on contracts that governed the relationship between MFAS and District 1. Because the Court grants summary judgment to Lincoln and District 1 on all of plaintiffs' claims, MFAS's claims are moot, and the Court therefore denies MFAS's summary-judgment motion.

ORDER

Based on the foregoing and on all of the files, records, and proceedings herein, IT IS HEREBY ORDERED THAT:

1. The motion of defendants Abraham Lincoln High School and the Institute for New Americans for summary judgment [Docket No. 115] is GRANTED.

2. The motion of defendant/third-party plaintiff Special School District No. 1 for summary judgment [Docket No. 126] is GRANTED.

3. The motion of third-party defendant Metropolitan Federation of Alternative Schools for partial summary judgment [Docket No. 110] is DENIED AS MOOT.

4. Plaintiffs' second amended complaint [Docket No. 70] is DISMISSED WITH PREJUDICE AND ON THE MERITS.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July16, 2008

s/Patrick J. Schiltz
Patrick J. Schiltz
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Case Number: 05-cv-2176 PJS/JJG

[Filed July 16, 2008]

Ibrahim Mumid, Fadumo Muse, Fahmo Ahmed, Safiya Mohamed, Iftu Jibril, Maymuna Muktar Osman, Misbah Ibrahim, Amal Mohamed, Shamsa Ali Mohamed, Yurub Siyad, Muna Mohamed, Amina Harun, Mohamed A Mohamed	)
V.	)
Abraham Lincoln High School, Special School District No. 1, Institute for New Americans	)
ThirdParty Plaintiff Special School District No. 1	)
ThirdParty Defendant Metropolitan Federation of Alternative Schools, Inc.	)

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

1. The motion of defendants Abraham Lincoln High School and the Institute for New Americans for summary judgment is GRANTED.

2. The motion of defendant/third-party plaintiff Special School District No. 1 for summary judgment is GRANTED.

3. The motion of third-party defendant Metropolitan Federation of Alternative Schools for partial summary judgment is DENIED AS MOOT.

4. Plaintiffs' second amended complaint is DISMISSED WITH PREJUDICE AND ON THE MERITS.

July 16, 2008 — RICHARD D. SLETTEN, CLERK

Date — s/Janet Midtbo
(By) Janet Midtbo, Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Case No. 0:05-CV-2176 (PJS/JJG)

[Filed July 22, 2008]

IBRAHIM MUMID, FADUMO MUSE, FAHMC AHMED, SAFIYA MOHAMED, IFTU JIBRIL, MAYMUNA MUKTAR OSMAN, MISBAH IBRAHIM, AMAL MOHAMED, SHAMSA ALI MOHAMED, YURUB SIYAD, MUNA MOHAMED, AMINA HARUN, and MOHAMUD A. MOHAMED,

Plaintiffs,

v.

ABRAHAM LINCOLN HIGH SCHOOL, THE INSTITUTE FOR NEW AMERICANS, and SPECIAL SCHOOL DISTRICT NO. 1,

Defendants,

SPECIAL SCHOOL DISTRICT NO. 1,

Third-Party Plaintiff,

v.)
)
METROPOLITAN FEDERATION)
OF ALTERNATIVE SCHOOLS, INC.,)
)
Third-Party Defendant.)
)

ORDER

Daniel R. Shulman, GRAY PLANT MOOTY MOOTY & BENNETT, PA; Robert J. Kolstad; R. Travis Snider, SNIDER LAW FIRM, LTD.; David L. Shulman, LAW OFFICE OF DAVID SHULMAN, PLLC, for plaintiffs.

Paula Weseman Theisen and Sarah R. Schmitz, MEAGHER & GEER, P.L.L.P., for defendants Abraham Lincoln High School and Institute for New Americans.

Sonya J. Guggemos, Margaret A. Skelton, and Kimberley K. Sobieck, RATWIK, ROSZAK & MALONEY, P.A., for defendant/third-party plaintiff Special School District No. 1.

Susan M. Tindal and Jon K. Iverson, IVERSON REUVERS, LLC, for third-party defendant Metropolitan Federation of Alternative Schools, Inc.

On July 16, 2008, this Court entered an order granting summary judgment to defendants [Docket No. 154]. The Clerk entered the judgment less than three hours later [Docket No. 156]. In the interim between the entry of the order and the entry of the

judgment, plaintiffs filed a letter requesting permission to file a motion for reconsideration under Local Rule 7.1(g) [Docket No. 155]. The relevant facts are as follows:

In the Fourth Cause of Action of their Second Amended Complaint, plaintiffs asserted a claim against Special School District No. 1 ("District 1") under the Equal Education Opportunity Act (EEOA). Second Am. Compl. ¶¶ 42-44 [Docket No. 70]. Plaintiffs concluded the Fourth Cause of Action by pleading that they were "entitled to recover such actual damages as they show themselves to have sustained and the trier of fact shall find . . . ." *Id.* ¶ 44. Nowhere in their Fourth Cause of Action did plaintiffs give this Court or District 1 specific notice that they were seeking any equitable relief at all; instead, plaintiffs gave notice only that they were seeking monetary relief to compensate them for "actual damages." *Id.*

In the Prayer for Relief, plaintiffs once again sought compensation for "such actual damages as they shall proved to have sustained. . . ." *Id.* ¶ A. Plaintiffs also sought two types of equitable relief: "an injunction requiring Special School District No. 1 to close Abraham Lincoln High School," *id.* ¶ D, and "equitable relief permanently enjoining defendants from engaging in such unlawful conduct in the future," *id.* ¶ F. Nothing in the Prayer for Relief gave this Court or District 1 notice that any other type of equitable relief was being sought.

Both the Fourth Cause of Action and the Prayer for Relief did include boilerplate language in which plaintiffs sought any other relief that might be

available under the law. Specifically, the Fourth Cause of Action sought "such other and further relief as may be available under law." *Id.* ¶ 44. And the Prayer for Relief sought "such other and further relief as is just, appropriate, and available under law." *Id.* at ¶ G. But this general language merely gave the Court and the defendants notice that plaintiffs were reserving their right to seek relief in addition to the relief specifically described in the complaint, should their entitlement to such additional relief become apparent as the case developed.

Plaintiffs did not seek such additional relief. Rather, more than two years into the litigation, and after substantial discovery and motions practice, District 1 and the other defendants moved for summary judgment. In its supporting memorandum, District 1 asserted in the course of arguing for dismissal of plaintiffs' EEOA claim that plaintiffs were seeking only three types of relief: (1) money damages to compensate for the harm that they had suffered, (2) an injunction forcing District 1 to close Lincoln, and (3) an injunction prohibiting District 1 from violating the EEOA in the future. District 1 Mem. Supp. Mot. S.J. at 31-34 [Docket No. 128]. District 1 then proceeded to argue that compensatory damages were not available under the EEOA and that plaintiffs had no standing to seek the two injunctions because those injunctions would not redress any injury suffered by plaintiffs. *Id.* District 1 asked that the EEOA claim be dismissed in its entirety. *Id.* at 50.

In their response, plaintiffs accepted District 1's description of the relief that they were seeking. Plaintiffs in no way suggested that they were seeking any other relief — legal or equitable. Plaintiffs argued

only that compensatory damages were indeed available under the EEOA and that plaintiffs did indeed have standing to seek the two injunctions. Pl. Mem. Opp. Def. Mot. S.J. at 68-71 [Docket No. 137].

In its July 16 order, the Court granted summary judgment to District 1 on plaintiffs' EEOA claim. The Court agreed with District 1 that compensatory damages were not available under the EEOA and that plaintiffs did not have standing to seek either of the two injunctions described in their complaint. In footnote 9 of the Court's July 16 order, the Court noted in passing that "equitable remedies of compensatory education or tuition reimbursement *might* be available under [20 U.S.C.] § 1703(f)." Order July 16, 2008 at 20 n.9 (emphasis added) [Docket No. 154]. The Court's observation was based on a possible analogy to cases under the Individuals with Disabilities Education Act (IDEA) — an analogy that had occurred to the Court while it was researching the EEOA claim. To be clear, though, the Court had — and has — no idea whether compensatory education or tuition reimbursement is in fact available under the EEOA, as they sometimes are under the IDEA. The Court did not reach the issue because plaintiffs did not raise it.

The Court's order was docketed at 1:46 p.m. on July 16, 2008. Less than two hours later — and about one hour before the Clerk entered judgment pursuant to the order — plaintiffs filed a letter asking for permission to file a motion for reconsideration under Local Rule 7.1(g). In their letter, plaintiffs informed the Court for the first time that they did indeed wish to seek compensatory education and tuition reimbursement from District 1. Plaintiffs conceded that they "did not brief the issue" and that they never

"specifically requested" these remedies. Pl. Letter July 16, 2008 at 1, 2. But plaintiffs pointed to the general language at the end of their Prayer for Relief — in which they sought "such other and further relief as is just, appropriate, and available under law" — and argued that this language was broad enough to include compensatory education and tuition reimbursement, especially if the language was "construed so as to do justice" as required by Fed. R. Civ. P. 8(e). *Id.* at 2.

The Court denies plaintiffs' request, for two reasons:

First, a motion for reconsideration is not an appropriate vehicle to challenge an order that directs the Clerk to enter final judgment. Rule 60(b) of the Federal Rules of Civil Procedure provides the sole means for seeking relief "from a final judgment, order, or proceeding." Fed. R. Civ. P. 60(b). It is true that plaintiffs technically filed their letter in the three-hour period between the time that the Court ordered that judgment be entered and the time that the Clerk actually entered the judgment. But this is a meaningless technicality, given that entry of judgment by the Clerk follows automatically from entry of an order directing that judgment be entered. It would be unfair if Rule 60's applicability turned on such fortuities as whether litigants happened to be sitting at their desks when electronic notice of the entry of an order was distributed and happened to be able to get a request to bring a motion for reconsideration filed before the Clerk was able to enter judgment.

Second, even if the Court were willing to entertain plaintiffs' request for permission to file a motion to reconsider, the Court would deny the request on the

merits. Under Local Rule 7.1(g), motions to reconsider are permitted "only upon a showing of compelling circumstances." D. Minn. L.R. 7.1(g). Such motions "serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir. 1988) (citation omitted). Plaintiffs do not present any newly discovered evidence; nor do they argue that the Court's order rests on a manifest error of fact. Instead, plaintiffs essentially argue that they would like to make a legal argument that did not occur to them until they read the Court's opinion.

A motion for reconsideration filed after a court has disposed of a case is not "the occasion to tender new legal theories for the first time." *Id.* (citation omitted). The Eighth Circuit has often held — most recently last week — that "a party cannot assert arguments that were not presented to the district court in opposing summary judgment in an appeal contesting an adverse grant of summary judgment." *Cole v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers*, __ F.3d __, No. 06-3205, 2008 WL 2756943, at *2 (8th Cir. July 17, 2008). The same principle applies here: In seeking reconsideration of an order granting summary judgment, a party may not rely on an argument that could have been — but was not — presented to the district court before it entered the order.

Again, at no point in this litigation did plaintiffs mention IDEA, compensatory education, tuition reimbursement, or non-injunctive equitable relief. Whether the boilerplate in the Prayer for Relief would preserve plaintiffs' right to seek such relief as a matter of *pleading* is beside the point. This case is long past

the pleading stage. After much discovery and motions practice, the parties fully briefed and argued motions for summary judgment. If, at that point, plaintiffs were seeking non-injunctive equitable relief, they had an obligation to tell the Court.

Accordingly, IT IS HEREBY ORDERED that plaintiffs' request to file a motion for reconsideration is DENIED.

Dated: July 22, 2008 s/Patrick J. Schiltz
Patrick J. Schiltz
United States District Judge

APPENDIX D

Minnesota Department of Education

1500 Highway 36 West, Roseville, MN 55113-4266
651-582-8200 TTY:615-[]
education.state.mn.us

June 9, 2005

Thandiwe Peebles
Minneapolis SSD # 001
807 NE Broadway
Minneapolis, 55413-2398

Ladan Bashir Yusuf
PO Box 14892
Minneapolis, MN 55414

Re: Complaint File #2132

Dear Superintendent Peebles and Ms. Yusuf:

This letter is to inform you of the findings of the complaint entered by Ladan Bashir Yusuf (Complainant) on behalf of students with disabilities at Abraham Lincoln High School (Students), residents of Special School District # 001 (District). What follows is the report of the investigation, the issues, findings of fact, conclusions of law or rule, and order, where applicable. Sue Thomas coordinated the investigation.

This investigation consisted primarily of a review of records sent by both parties, an on-site visit to the Minneapolis office as well as Abraham Lincoln High School (ALHS) for a file review and consultations with MDE monitoring and ELL department personnel.

ISSUE

The Complainant alleges the District failed to develop a system designed to identify pupils with disabilities at the ALHS. Specifically, the Complainant alleges that when a student is having difficulties in school, the District does not refer the student for evaluations for special education and related services, but instead, places the student back in an earlier grade.

Findings of Fact

1. ALHS is a high school for students aged 14 to 21 (or until age 23 under certain circumstances) who have recently arrived in the United States. ALHS provides a curriculum in history, math, sciences, literature, social studies and computer, in addition to intensive instruction in the English language and United States culture. It is run by the non-profit Institute for New Americans, and serves the District's students through a contractual arrangement by which it agrees to comply with all District policy guidelines as well as applicable laws and regulations. Special education services for those students at ALHS who are eligible are provided by the District.

2. The Students addressed by this complaint are all Students who have been enrolled in ALHS during the past three years.

3. The contractual agreement between the district and ALHS includes the following special education and Section 504 provisions:

   A. School shall require School staff to participate in staff development sessions regarding appropriate implementation of special education services.
   B. For any prospective District student with an IEP (individual education plan) or an IAP (individual accommodation plan under Section 504), School shall convene an intake meeting to review the IEP or IAP prior to enrolling the student. If the student's previous school did not convene an IEP or IAP meeting prior to the student leaving that school, School shall hold an IEP or IAP meeting prior to enrolling student.
   C. For any prospective District student with an IEP or an IAP, School shall evaluate the student's needs as identified in the IEP or IAP to determine if School can effectively serve the student at its site.
   D. For any District student with an IEP School shall provide appropriate space for District to provide special education and related services required by the IEP.
   E. School shall require classroom teachers to implement the provisions of the IEPs and IAPS that require classroom modifications or accommodations.

F. School shall pay District for the District's costs for providing special education services and related services in accordance with the provisions of Exhibit No.4.

4. The Exhibit 4 referenced above contains the following

A. Special education and assessment will be provided for students who are in need and qualify for such services by licensed special education staff, or staff with approved [Minnesota Department of Education] variances. The District will provide school psychologist, speech and language services and due process support necessary to complete such assessments and maintain due process records. The School will pay the District for the cost of the Special Education Teacher and the Social Worker assigned to support those teachers.

B. There is minimal special education support provided directly to your site at this level. However, a pool of special education teacher(s) will be funded by assessing a per student fee, based on the total number of students contracted for. This pool will allow additional support on an "as needed" basis. This pool will initially be staffed by one (1) teacher. If necessary, pool size will be increased and funded by an additional assessment.

C. If your site desires, additional support may be provided at additional cost to be arranged as needed.

D. Additional clerical support and support of a work coordinator is also included in this fee.
E. Cost for this service for school year 2004-05 will be $52,614.46... .
F. Cost for this service [for the 2003-04 school year] will be 31,5000... .
G. Cost: $180 per ADM [Average Daily Membership] for FY03... .

5. The Students at ALHS are divided into two different groups based on performance level. The Students who are significantly behind grade level are placed in level 9B, and those needing less help are placed in grades 9, 10, 11, and 12 on the A side. Level 9B is primarily language immersion.

6. According to current Minnesota Automated Reporting Student System (MARSS) data, the state average of students identified as eligible for special education and related services is 12.5 percent of the student population.

7. Student enrollment at ALHS for the past three years was reported to Minnesota Department of Education (MOE) as follows:

School year	Enrollment	% Receiving ELL Services	% Receiving Special Education Services
2002-03	411	91%	0
2003-04	288	89%	0
2004-05	312	100%	0

8. During the 2002-03 school year, one student was referred for a special education evaluation. In May 2003, HM was evaluated and found eligible for special education services by meeting the eligibility criteria for speech/language services. During the 2002-03 school year, three students who previously had been found eligible for, and in need of, special education and related services while at schools other than ALHS, continued to receive special education and related services at ALHS.

- RB who was evaluated and found eligible for special education and related services three years after arriving in the United States and enrolling in the District, received services pursuant to IEPs dated November 30, 2001, and November 5, 2002;
- DM, who was evaluated and found eligible for special education and related services three years after arriving in the United States and enrolling in the District, received services pursuant to an IEP dated December 4, 2002; and
- JO was found eligible for, and in need of, special education and related services by meeting state eligibility criteria in the area of deaf and hard of hearing (DHH), received services pursuant to an IEP dated February 5, 2002.

The total student population for the 2002-03 school year was 411. The four students receiving special education and related services represent less than 1 percent of the student population.

9. During the 2003-04 school year, one student, AA, was referred for a special education evaluation. Rather than evaluate AA, the team decided her needs could be better met by a 504 plan. AA transferred to a different school prior to a 504 plan being written. Two students, HM and AS, who was evaluated and found eligible for special education and related services three years after arriving in the United States and enrolling in the District, received continuing special education services.

   The total student population for the 2003-04 school year was 288. The two students receiving special education and related services represent less than 1 percent of the student population.

10. During the 2004-05 school year, the following six students were referred for special education evaluations.

    - HM2, who was born January 1, 1989, and arrived in the United States November 29, 2000, is currently receiving pre-referral interventions using the Minneapolis Problem-Solving Model (PSM).
    - YS who was born on February 2, 1983, and entered the District on November 25, 2002, had aged out before referral and was referred to Adult Basic Education.
    - AA2, who was born on January, 1986, who had no schooling prior entering the District on November 13, 2001, is receiving pre-referral interventions using the PSM.
    - WNS who was born on May 15, 1988, and who the District reports will be considered

for an evaluation after he has been in the United States for a year, in light of his very limited English language skills, and lack of schooling prior to entering the United States on April 15, 2004.

- NS, who was born on January 1, 1983, and entered the United States on December 10, 1999, had aged out of services before referral and was referred to Adult Basic Education.
- ANN who was born on March 4, 1990, and who the District reports will be considered for an evaluation after he has been in the United States for a year in light of his very limited English language skills, and lack of schooling prior to entering the United States on December 20, 2004.

Three ALHS students receive continuing special education services during the current school year: HM, HLM, and NA .

The total student population for the 2004-05 school year was 312. The three students receiving special education and related services represent less than 1 percent of the student population.

11. The following was also noted during a review of District records:

A. EA, who entered the United States on April 19, 2002, and is now 19 years old, is still unable to read according to March 2005 documentation from her teachers. EA appears to be receiving tutoring as part of the PSM for pre-referral interventions and

has not been referred for a special education evaluation. The earliest date noted for interventions is March 23, 2005. EA is in grade 11.

B. In the five years that 19 year old AM has been enrolled in ALHS, she has earned 61.500 of the 81.250 credits with 60 credits being required for graduation. She has attempted but has not passed any of the Minnesota Basic Standard Test (MBST). AM is not a student ALHS has looked at for pre-referral interventions.

C. AS2 has been enrolled at ALHS since March 13, 2000, is 22 years old, and is in level 9B. AS2 has not been considered for the pre-referral process.

D. IM enrolled at ALHS on August 2,1999, is 23 years old and is in grade 10. IM has not been considered for the pre-referral process.

E. AM2 enrolled at ALHS on June 22, 1999, is twenty-three years old and in grade 10. AM2 has not been considered for the pre-referral process.

F. The pre-referral intervention noted for HM2 is encouraging him to slow down and check his work. HM2 is in level 9B.

G. In a March 2005 letter to ALHS, YS noted that she had finished her credit requirements but has been unable to pass the MBST. YS appears to have first been referred to the tutoring room as an intervention in March 2005. YS's credit evaluation shows she has earned 81.5 credits when 60 credits are required for graduation, but has yet to pass the MBST. YS is in grade

11 and will "age out" at the end of the school year.

H. The pre-referral sheet for AA2 notes that the teachers "[has] not done much different for AA2 because his attendance is so irregular. I allow him to work with tutors and remind him about missing assignments:" AA2's teachers noted the following concerns:
   - AA2 seems to be making almost no progress in pre-algebra;
   - has low reading and writing skills and lack of progress;
   - low math skills;
   - low test scores; and
   - struggles constantly and can not keep up.

   AA2 began receiving pre-referral interventions in November 2003. AA2 is in grade 12.

I. According to teacher comments, NS does not know how to read and write, struggles with decoding and comprehension, develops her skills slowly and often experiences regression with her abilities. The noted current levels of performance indicate she is failing her classes. NS is not literate in her native language. The staff believes she has some type of depression and has lengthy absences. In 2001, NS's teachers provided the following concerns about the Student:
   - Student needs special education classes.
   - I have tried all the possibilities that I thought optional, but all remained with no result. In addition to that she had tutoring including teachers

working her on one on one. I give up hope on her.

- I have been teacher NS for two years, but her English reading and writing are not improving. In my opinion, she needs special education to improve her English.

NS began receiving tutoring in December 2003. After move than five years at ALHS, NS has not passed the MBST, is in grade 10 and will "age out" of the program at the end of the school year.

J. The PSM worksheets found in a limited number of ALHS files were all dated as written in March and April of 2005, with service dates being backdated to as early as 2003.

K. The limited number of progress reports found in a few of the Students' files contained vague progress statements such as "the student has shown much improvement." All files lacked starting data and frequent reviews to monitor progress to determine the success or failure of any pre-referral interventions.

12. The District reports the following special education referral process for ALHS students:

> Most students at ALHS are English Language Learners; many students are at a very beginning level of English language learning. Compounding the language issues facing most ALSH students are other problems that face students and families new to the United States, including cultural

differences, lack of formal schooling before entering the U.S., unfamiliarity with school calendars, and financial issues that may require students to juggle jobs with school schedules. Two factors a school team must consider when a student has academic difficulties, therefore, are whether those problems arise from the language problems, or lack of previous formal education or both. Because of these potentially disqualifying factors, the first intervention normally considered to address academic difficulties is not a referral for special education evaluation but rather the provision of ELL and basic education services. Only after such factors have been considered is an evaluation for special education services proposed.

Instead, when a teacher has concerns about a student's performance, she may refer a student to one or more of the school's "cultural advisors." Cultural advisors, as the term implies, are teachers and other staff at the school who speak the student's language and are familiar with the cultural issues the student may be facing. Issues that are primarily language-related or that are related to ethnic, cultural or economic factors can be identified and addressed at this stage. Students may also be referred to a "student assistance team." A student assistance team involves six adults, including teachers and volunteers from colleges with which the school has connections (including Augsburg and the

University of Minnesota). The school has a roster of about eighty volunteers available to help out when students have difficulties, and through intervention by the student assistance team many students are able to make progress in the general education environment.

In order to assist the school to decide when general education interventions may not be enough, District special education staff have conducted in-service trainings for ALHS staff. On October 7 and October 14, 2003, the District ELL Special Education team instructed ALHS staff on how (and when) to evaluate English language learners for special education. Topics covered included pre-evaluation interventions to try, steps to take and questions to consider before, during, and after special education evaluations. Another in-service training was completed in March 2004 using August 2003 materials on "Evaluations of English Language Learners for Special Education. Moreover, a District special education teacher visited ALHS weekly throughout 2003-02 and the current year to spend three hours at the school whether she had students to meet with or not, to be available for consultation and advice.

13. The training materials provided by the District, and noted as the materials used for the October 7 and October 14 2003 trainings, do not address special education referrals but rather, list a

number of curriculum and instructional modifications for various curriculum areas.

14. The copy of the August 2003 training materials entitled "Evaluation of English Language Learners for Special Education" provided by the District contains the following handwritten notation next to the information on informal testing: "To make sure it's not language you're testing - descriptive information gathered over years." (Emphasis added).

15. The Complainant alleged that the District has a policy to not test students for special education until they have been in English Language Learners (ELL) for at least three years but that the age limit for testing is 18 years old even though students are eligible to remain in the school until they were 21.

16. During the site-visit, the complaint investigator was repeatedly told that before a student could be evaluated for special education, the District had to be able to rule out lack of previous education or limited English proficiency which would require time for the Student to overcome either of these barriers.

17. On September 12, 2002, the MDE approved a renewal of a rule waiver allowing the District to implement the PSM based on the following relevant stipulations:

    A. Applicable federal law may not be waived by [MDE] so the District remains obligated to follow all pertinent federal

regulations (as well as state rules which are not waived).

B. Referrals for special education evaluations must be timely and not unnecessarily delayed at Stages 1 and 2 of the PSM.

18. When asked about its use of the PSM for pre-referral interventions, an ALHS administrator stated they have tutoring rooms available for students who are having difficulties with classroom material. The tutoring rooms are staffed with volunteers, including middle and high school students as well as college students and people from the community. There is no educational requirement for this volunteer position. The ALHS staff provided no other examples of interventions using the PSM.

19. When questioned about specific .students and general school policies, the ALHS administrator appeared to lack a basic understanding of special education eligibility categories, pre-referral intervention strategies and the evaluation process.

20. Students, who lack English language skills or fail to demonstrate adequate progress, are placed in level 9B which ALHS described as a language immersion program. One ALHS employee shared with the investigator that Students in 9B will never have the language skills to graduate from ALHS. These Students are most likely to drop out or age out and are unlikely to meet the graduation incentive program standard set out in Minn. Stat.

§ 124D.68 to receive education from ages of 21 to 23.

21. Of the 94 active Students over the age of 21, 43 (46%) of the students are in grade level 11 or below and typically would not be expected to graduate at the end of the year. It is unclear how many of the remaining 51 students will graduate at the end of the year or how many students under the age of 21 will graduate. Fourteen (33%) of the 43 Students who will "age out" are in level 9B.

Additionally, 39 students between the ages of 21 to 23 withdrew, with 13 (33%) of them withdrawing because they "aged out." Fifteen (38%) of the Students who withdrew were in level 9B.

22. During the last three school years, students at ALHS have had a 17 percent passing rate on the MBST. These numbers do not include the exempt students or the students who did not take the tests.

23. Current data kept by MDE shows that the state pass rate on the MBST for Ell students is around 40 percent.

24. The District has renewed its contract with ALHS for the 2005-06 school year. The new contract will contain the following provisions for improvement:

- A District teacher will be housed one day a week at ALHS who will provide him

with a private office, access to student files, access to all programs in the school and a confidential area in which to discuss student concerns with students and families. He will prepare weekly information reports. If the need arises, he will be assigned there two days per week.

- ALHS will hire a full time special education teacher from the District for FY 06. The special education teacher will be housed at ALHS and will have the same access rights and accommodations as the District teacher. This staff will provide additional support for struggling students and will be able to evaluate the effectiveness of the programs at ALHS. This staff will serve as a liaison in all areas between the school and the District.
- The Alternative Schools office will provide training for the development and implementation of individual learning plans for all students in order to ensure that there is clear communication regarding credits, transcripts, available education options and graduation requirements. Students, parents or other responsible family members and a representative from ALHS will sign these to ensure clarity of communications.
- The District will arrange required staff development for all staff at ALHS in areas of cultural sensitivity and any other areas that its liaison feels there is a need.

- ALHS will institute a clearly defined grievance procedure to resolve any issues that students have regarding the school The District will oversee the development and implementation of this process. This information will be included in the intake process for new students. Current students will be immediately informed of this process.

Conclusions

1. MDE has the authority to review alleged violations that occurred up to three years prior to the receipt of the complaint by MDE when the allegation is of continuing violations, or the complainant is requesting compensatory services for a violation that occurred within the three years. 34 C.F.R. 300.662(c).

2. The violations alleged in this complaint are continuing and compensatory education is requested. MDE has authority to review the alleged violations for the past three years.

3. The District entered into a contract with the ALHS under the authority of Minn. Stat. § 124D.68, Subd. 3(d).

4. Although the Students are attending ALHS through a contracted agreement, the primary responsibility for the education of a child with a disability remains with the District. Minn. Stat. § 125A.05.

5. School districts must have systems "designed to identify pupils with disabilities beginning at birth" and attending both public and non-public schools, or not attending any school but who are of school age. Minn. R. 3525.0750.

6. Districts must have a Total Special Education System (TSES) which includes:

> ... child study procedures for the identification and evaluation of students or other persons suspected of having a disability beginning at birth that include a plan for receiving referrals from parents, physicians, private and public programs, and health and human services agencies.

Minn. R. 3525.1100, subp. 2(A).

7. Minnesota Statute at § 125A.03, Special instruction for children with a disability, requires:

> (a) As defined in paragraph (b); every district must provide special instruction and services, either within the district or in another district, for all children with a disability . . . who are residents of the district and who are disabled as set forth in section 125A.02. For purposes of state and federal special education laws, the phrase "special instruction and services" in the state Education Code means a free and appropriate public education provided to an eligible child with disabilities and includes special education and related services

defined in the Individuals with Disabilities Education Act, subpart A, section 300.24.

(b) Notwithstanding any age limits in laws to the contrary, special instruction and services must be provided from birth until July 1 after the child with a disability becomes 21 years old but shall not extend beyond secondary school or its equivalent, except as provided in section 124D.68, subdivision 2.

2. Local health, education, and social service agencies must refer children under age five who are known to need or suspected of needing special instruction and services to the school district. Districts with less than the minimum number of eligible children with a disability as determined by the commissioner must cooperate with other districts to maintain a full range of programs for education and services for children with a disability. This section does not alter the compulsory attendance requirements of section 120A.22.

8. Additional guidance is found in Minn. Stat. § 120A20, Subd. 3:

Subd. 3. Pupils, at least 21 years of age. In addition to those admitted under subdivision 1, admission to a public secondary school is free to a person who is eligible under this subdivision. In order to be eligible, a person must be:

(1) at least 21 years of age;

(2) a resident of the district where secondary school is located; and

(3) eligible under section 124D.68, subdivision 2.

Free admission is limited to two school years or the equivalent, or until the pupil completes the courses required to graduate, whichever is less. A district that admits a person to school under this section must have a reasonable expectation that the person can obtain a diploma within two years.

9. Based on the numbers alone, it is apparent that ALHS does not have a system in place designed to identify students with disabilities. During the past three years, ALHS has identified one student, as a student with a disability. Less than one percent of its student population has been identified as eligible for special education and related services each of the past three years. The state average for special education students identified within a given population is 12.5 percent. It is highly probable that ALHS has missed the identification of numerous special education students each of the past three school years.

10. Compounding to ALHS' lack of identified special education population is its 17 percent pass rate on the MBST, which is significantly below the state average for ELL students. Also of note is its extremely high "age out" rate. The data indicates that the Students of ALHS are in need. of something more than is being provided.

11. Of the few students who were found eligible for, and in need of, special education at ALHS or

another school in the District, the majority of students were not evaluated until they had been in the United States for at least three years. The exceptions were for a student with a significant hearing loss and a student with a severe speech deficit.

12. The District also determined one student, AA, could be served with a 504 plan without the benefit of an evaluation to make the determination whether the student had a disability as required by 504 as well as IDEA.

13. Special education related services must be individualized and based on the needs of each student. 34 C.F.R, § 300.26. Students in the pre-referral process were not provided with individualized plans, but were given access to the tutoring room where volunteers attempted to provide appropriate instruction with lack of direction as the limited pre-referral worksheets were not in existence prior to March 2005. Other students were placed back in level 9B if they were unable to make adequate progress in the other class room settings. Data has not been collected on these students to allow an objective measure of the success or the failure of any attempted interventions. Goals were not set and progress reports were not completed. This has resulted with Students at ALHS spending years in interventions, only to "age out" without ever having been evaluated.

14. The pre-referral process, including the special education evaluation, is excessive if longer than

six months unless the student is making measurable progress with these interventions.

15. In general, the District did not evaluate ELL students until they have been in ELL for three years. This practice seemed to be tied to the District stance that it must first rule out lack of previous instruction and limited English proficiency before a student could be evaluated. For students referred during the 2004-05 school year, the District noted that the mandatory waiting period is one year.

16. The legal provisions that a student's lack of previous instruction or limited English proficiency must not be the determinant factor if the student does not otherwise meet eligibility criteria is found in 34 C.F.R. § 300.534(b) as part of the evaluation process. The appendix to the federal regulations clarifies that:

> ... a public agency must ensure that a child who has a disability, as defined in § 300.7 (i.e. a child who has been evaluated in accordance with §§ 300.53-300.536 as having one of the thirteen listed impairments, and who because of that impairment needs special education and related services) is not excluded from eligibility because that child also has limited English proficiency or has had a lack of instruction in reading or math. (See also § 300.532, which bas been revised to require that assessments of children with limited English proficiency must be selected and administered to ensure that they measure the extent to which the child has a

disability and needs special education, and do not instead measure the child's English language skills.)

Attachment 1 - Analysis of Comments and Changes to the Federal Regulations at p. 12635-6.

17. The District's misunderstanding of the law has prevented an unknown number of students from being evaluated. It is likely that many students who should have been evaluated have "aged out" of the program at ALHS. This year alone there are 14 students over the age of 21 in level 9B who have no realistic hope of graduating. All 14 of these students have been at ALHS for over a year with the majority well into their third year and yet have not shown sufficient success to progress out of the remedial level classroom.

18. Except for students with an IEP or 504 plan, Minn. R. 3501.0110 requires districts to develop remediation plans for students who have not passed one or more basic requirements test at least two years before the anticipated date of the student's graduation.

19. Although the majority of student files reviewed had documentation of the student's failure to pass the MBST, no remediation plans were found in the files.

20. Testing requirements can be individualized for students with IEPs or 504 plans as outlined in Minn. R. 3501.0900:

Subpart 1. Considerations for students with IEPs or section 504 accommodation plans.

A. The IEP or section 504 accommodation plan for a student with a disability shall identify one of the following decisions for each of the basic requirements:

(1) the student is expected to achieve the statewide standard with or without testing accommodations;

(2) the student is expected to achieve the statewide standard at an individually modified level of difficulty; or

(3) the student is exempt from the statewide standard.

An exemption from the statewide standard shall be granted to a special needs student when the student cannot demonstrate the required degree of learning with appropriate accommodations or modifications if:

(a) the student's IEP or section 504 accommodation plan does not and never has included the requirements on which the tests are based; or

(b) the student is enrolled in special education classes for the subject matter included in the test, but the student's IEP or section 504 accommodation plan does not include a majority of concepts tested.

B. Adoption of modifications or exemptions for a student as stated in item A, shall occur concurrently with the adoption of transition goals and objectives as required in Minnesota Statutes, section 125A.08, paragraph (a), clause (1).

Subp. 2. Testing students with IEPs or section 504 accommodation plans.

A. All students shall be tested under standard conditions as specified by the developer of the test except those students whose IEPs specify other decisions consistent with subpart 1, item A.

B. Decisions regarding appropriate testing conditions including a decision to provide accommodations for a student with special needs shall be made by the local school district through the IEP process or the section 504 accommodation plan process and shall be reviewed annually.

C. Where subpart 1, item A, subitem (2), applies, the student's IEP or section 504 accommodation plan shall define an appropriate assessment of the statewide standard at a modified level of difficulty. Achievement of the individually modified standard shall be certified only through documented student performance of the defined assessment.

21. It is highly probable that many of the students who have been unable to graduate from ALHS because of their inability to pass the MBST were in need of either an IEP or a 504 plan. The life events, such as trauma and depression, that the school asserted might be the cause of educational problems rather than disability do not preclude identification of a student as eligible for special education.

22. NS has spent more than five years in the Minnesota school system and is not be able to

read or write. Her lack of progress was not adequately addressed despite written statements by three separate teachers who felt she needed special education. NS does not seem to be an isolated case. As can be seen by NS's continued failure to make progress and noted regression as well as her inability to read or write after more than five years at ALHS, this student was harmed by the District's failure to evaluate her after the three teacher referrals in 2001.

23. Case law supports a conclusion that a remedy of compensatory education is available for Students past the age of entitlement under IDEA. See *Zobrest v. Catalina Foothills School District,* 113 S.Ct. 2464, 245, n.3 (1993); *Burlington School Committee v. Mass Dept. of Ed,* 471 U.S. 359, 369 (1984); *Miener v. State of Missouri*, 800 F.2d 749, 753 (8th Circ. 1986).

Decision

The District violated Minn. R. 3525.0750 when it failed to have a system in place designed to identify students with disabilities.

The District violated 34 C.F.R. § 300.534(b) when it failed to evaluate students because of their lack of previous instruction or limited English proficiency.

The District violated Minn. R. 3501.0110 when it failed to develop remediation plans for students who have not passed one or more basic requirements test at least two years before the anticipated date of the student's graduation.

Corrective Action

1. Within five days from the date of this decision, the District will submit a memorandum outlining the use of the PSM consistent with this decision, progress is documented in measurable terms, and the entire PSM process takes no more than six months.

2. Within 15 days from the date of this decision, the District will provide data on the present levels of performance in the core academic areas as well as English language proficiency for each student currently in level 9B.

3. Within 15 days from the date of this decision, the District will provide MDE with remediation plans for each student who has not passed the MBST at least two years before the anticipated date of the student's graduation.

4. Within 15 days from the date of this decision, the District will provide to MDE progress reports based on measurable data for each student who received pre-referral interventions during the 2004-05 school year, including any student who was in level 9B for more than six months during their time at ALHS. The District will include in this group Students over the age of 21 who meet the above stated criteria. After reviewing this data, as well as any additional data MDE believes is necessary, MDE will make a determination as to which students have not shown significant measurable progress as a result of the pre-referral interventions. The District will then conduct a special education

evaluation for any student from this group that MDE determines has not shown significant measurable progress. The evaluations will be completed prior to the beginning of the 2005-06 school year. Students over the age of 21 will be evaluated if they are found to be part of the above referenced group. Students who are found eligible for, and in need of, special education and related services under the above stated Corrective Action above maybe entitled to compensatory services even if they are over the age of 21. Accordingly, the District will forward all evaluation results to MDE for further review and a determination as to entitlement to compensatory special education services.

5. By November 1, 2005, the complaint investigator will review the file of every student who has attended ALHS during the past three years to determine whether other students may have been impacted by the District's child find failure.

6. All staff at ALHS will be required to participate in training on the areas of noncompliance noted in this decision. For each of the next two school years, staff from the District will provide training in the areas of child find, pre-referral interventions, and special education evaluation and identification, including an overview of each of the disability categories. The training will be at least one full day and be conducted for the 2005-06 and the 2006-07 school years, preferably as part of the training conducted before the first scheduled day of school for each of the above stated school years.

7. To help ALHS learn to identify students in need of special education and related services, until ALHS child find numbers reach numbers comparable to state child find averages, for each student enrolled at ALHS, staff will collect baseline data, write measurable goals and provide four progress reports based on the measurable goals. The progress reports will be provided quarterly both to the students and to MDE.

8. Prior to August 1, 2005, the District will hold a community meeting to be facilitated by a neutral group such as the Mediation Center of Hamline University, or a similar agency with approval by MDE, whose services will be provided at the expense of the District. The purpose of this meeting is to inform ALHS Students and their parents of the findings of this complaint and the due process rights of any student, including students over the age of 21, who believes they may have an unidentified disability. The District will contact the Mediation Center prior to July 1, 2005, to arrange for facilitation services and will accept the recommendations made by the Mediation Center as to the qualifications and number of facilitators necessary for this meeting. The District will provide interpreters for this meeting and distribute notices of procedural rights in the native language of the expected attendees. The meeting will be held at a time reasonably calculated to allow students and parents to attend. Notice of this meeting will be mailed to each Students' home in the Students'

native language. The District will inform MDE of the date and time of this meeting.

9. Within five days from the date of this decision, the District will conduct a special education evaluation plan meeting for NS. Within 60 days from the date of this decision, the District will provide MDE with a completed evaluation report on NS. If NS is found eligible for, and in need of, special education and related services, the District will provide compensatory educational services to NS that would ensure that she is returned to the position she would have been in had the District followed through on the teacher referrals four years ago. If the parties are unable to agree on a compensatory education plan, the District will notify MDE within the above stated timeline and MDE will determine the compensatory education plan.

The authority to review complaints is given in the federal regulations to the Individuals with Disabilities Education Act (IDEA), 34 C.F.R. §§ 300.660-.662. Questions about this decision or subsequent concerns about the District's implementation of the corrective action should be directed to the compliant investigator, Sue Thomas at 651.582.8844.

Sincerely,

/s/ Amy L. Roberts
Amy L. Roberts, J.D.
Director
Division of Compliance and Assistance
ALR:JP:
C Kim Mesun

APPENDIX E

School Improvement Plan

[*Fold-out exhibit, see next page*]

Department of Education	NCLB Consolidated Programs 1500 Highway 36 West Roseville, MN 55113-4266	SCHOOL IMPROVEMENT PLAN	ED-02366-01

Submitted for (check appropriate box(es)):

- X Adequate Yearly Progress (AYP) Plan Requirements for Schools
- ☐ Comprehensive School Reform Plan/Funding (Due May 16, 2005)
- ☐ School-wide Program Planning

SCHOOL YEAR
2005 - 2006

I. IDENTIFICATION INFORMATION

District Name				District Number
SPECIAL SCHOOL DISTRICT #1				[redacted]
Address	**City**	**State**	**Zip Code**	
807 Broadway	Minneapolis	MN	55413	
Superintendent		**Telephone Number**	**Fax Number**	
Bernadiwe M.C. Peebles, Ed. D.		(612) -668-0200	(612) -668-0195	
District Contact Person (If other than district admin.)	**Title**	**Telephone Number**	**Fax Number**	
	Dir. of Funded Programs	(612)-668-0472	(612)-668-0471	
District Contact E-Mail Address				
ssnapp@mpls.k12.mn.us				

School Name				District Number
The Institute for New Americans (Lincoln International High School)				391
Address	**City**	**State**	**Zip Code**	
730 Hennepin Avenue	Minneapolis	MN	55403	
School Principal		**Telephone Number**	**Fax Number**	
Joel Gibson, Executive Director		(612)872-4088	(612) -872-4089	
School Contact Person (if other than principal)	**Title**	**Telephone Number**	**Fax Number**	
Nata Samb	Academic Dean	(612)-872-8690	(612) -872-4089	
School Principal Contact E-Mail Address		**School Contact E-Mail Address**		
joel@solfaith.org		joel@solfaith.org		

Current Title I Status (check one)	Percentage of Students Receiving Free/ Reduced Price Lunch	Grade Levels Served by School
☐ Targeted Assistance X School-wide Project	96%	9-12

Identified Area of Needs Assistance Please check area(s) cited for improvement Stage 2 1	Check the category that best describes the area where the school is located:
X Reading Participation and/or Proficiency X Mathematics Participation and/or Proficiency X Attendance X Graduation	☒ Urban ☐ Suburban ☐ Rural

II. ASSURANCES
(AYP/COMPREHENSIVE SCHOOL REFORM/SCHOOLWIDE PROGRAM PLANNING)

AYP ASSURANCES

By accepting NCLB Title I Part A funds, your LEA agrees to ALL of the following assurances:

1. Each school identified for the Title I School Improvement status shall create or revise a school improvement plan with the input of outside experts, teachers, parents and the school's support team as outlined in Section 1116 of PL 107-110
2. Each school identified for the Title I School Improvement status will spend at least 10% of the school's allocation under Title I, Part A for staff development in the current school year
3. NCLB funds will supplement and not supplant state and local funds, including those funds provided under state law for the transportation of students.

EXHIBIT PP

II. ASSURANCES (AYP/COMPREHENSIVE SCHOOL REFORM/ SCHOOLWIDE PROGRAM PLANNING)

AYP ASSURANCES (continued)

4. The School Improvement Plan will be developed/revised within 90 days of identification and shall cover a two-year period.

5. Each school identified for Title I School Improvement status will provide an explanation of the parent's option to obtain supplemental education services for their child, if applicable.

6. **School Choice**: Plan includes provision of written notice to families about the school status in a format and language that is understandable.

7. **District Peer Review**: The District reviewed by an established peer review process the school plan within 45 days of receiving it.

COMPREHENSIVE SCHOOL REFORM ASSURANCES

Assurance is provided to the Minnesota Department of Education that:

1. The programs and services provided with Federal Comprehensive School Reform funds will be operated so as not to discriminate on the basis of age, gender, race, national origin, ancestry, religion, creed, pregnancy, marital or parental status, sexual orientation,

handicapping conditions, or physical, mental emotional, or learning disabilities.

2. Administration of the program, activities, and services covered by this application will be in accordance with all applicable state and federal statutes, regulations and the approved application.

3. The funds received under the Comprehensive School Reform (P.L. 107-110) will be used to address the goals set forth in the attached application(s); fiscally related information will be provided within the timelines established for the program.

4. The funds will be used to supplement, not supplant non-federal funds.

Assurance is provided that funds made available under the Comprehensive School Reform (P.L. 107-110) initiative shall be used for a comprehensive school reform that:

5. Employs strategies and proven methods for student learning, teaching, and school management that are based on reliable research and effective practices, have been replicated successfully in schools with diverse characteristics, and have resulted in significant improvements in student achievement;

6. Has a comprehensive design for effective school functioning, including instruction, assessment, classroom management, professional development, parental involvement, and school management, that aligns the school's curriculum, technology and professional

development into a school-wide reform plan designed to enable all students to meet challenging state content and performance standards. The design should address needs identified through a school needs assessment;

7. Provides high quality and continuous teacher and staff professional development and training consistent with Sec. 9101(34) of P.L. 107-110;

8. Has measurable goals for student performance and benchmarks for meeting those goals;

9. Is supported by school faculty, administrators and staff;

10. Provides support for teachers, principals, administrators and staff;

11. Provides for meaningful involvement of parents and the local community in planning and implementing school improvement activities consistent with Sec. 1118 of P.L. 107-110;

12. Uses high quality external technical support and assistance from a comprehensive school reform entity (which may be a university) with experience or expertise in school-wide reform and improvement that provides support to school personnel;

13. Includes a plan for the annual evaluation of the implementation of school reforms and the student results achieved.

II. ASSURANCES *(continued)*
(AYP/COMPREHENSIVE SCHOOL REFORM/ SCHOOLWIDE PROGRAM PLANNING)

SCHOOLWIDE ASSURANCES

By submitting a School-wide Improvement Plan, your LEA assures that:

1. The school-wide program option is initially available only to Title I schools that serve 40% (or greater) low income families.

2. The school-wide plan has been developed and designed with broad-based involvement, including teachers, principals, district administrators and other appropriate school personnel, with parents of participating students, and with secondary students if the plan relates to a secondary school.

3. The plan, where appropriate, is developed in coordination with other important programs within the school.

4. The plan is reviewed and updated regularly to reflect the needs of all children in the school.

5. Each school's school-wide plan incorporates the essential components of a school-wide program as described in Section 1114(b) (1) of NCLB.

III. LOCAL BOARD OF EDUCATION ACTION

The Local Board of Education _____ (district name) has authorized _____ (person's name) at a monthly meeting held on _____ to act as the LEA Representative in filing the attached plan as provided under Public Law 107-110 for the school year 2005-2006. The LEA Representative will ensure that the school district maintains compliance with the appropriate Federal statutes, regulations and state procedures currently in effect and will act as the responsible authority in all matters relating to the administration of this improvement plan. The following person is authorized as contact person:

_____ _____

Signature of LEA Representative Date

IV. VERIFICATION OF INFORMATION

I hereby verify that all the information provided in this application is true and accurate to the best of my knowledge.

/s/ _____ 11/18/05

Signature - Principal Date

_____ _____

Signature - Superintendent Date

FOR STATE USE ONLY	
This application has been approved as meeting the requirements for: ☐ AYP ☐ School-wide ☐ CSR	
Final Approval Signature	Date
Comments:	

V. LEADERSHIP TEAM INFORMATION

1. Explain how and when you established a leadership team to guide the school improvement process with representation of the following school constituents: parents, school staff, district representatives, and outside experts.

The leadership of the Institute for New Americans, parents of immigrant and refugee students and community leaders met to work on the vision and mission of Lincoln High School in 1996. The Vision and Mission are always part of the leadership team's consideration in making major decisions such as staff, curriculum enhancement, school environment, program location and the solicitation of community partners. This core of members of the

leadership team was an integral component of the development of this (2005) SIP.

The leadership team attempts to see that the curriculum of the school is reflective of the needs of the student population. Most recently, the leadership team has worked to make additional investments in staff development related to ESL instruction and cross-discipline collaboration, additional books and other instructional materials.

The leadership team attempts to base most of its decisions and activities on the unique population of the school; e.g., time and place of student reflective periods, adult diploma program, cultural displays and performances, diversity of the staff, cultural advisors hired to deal specifically with the needs of immigrants and the integration of special tutorial help at all levels.

2. Members of the Leadership Team

Name	*Title*	*Role*
1. Joel Gibson	1. Director/ Headmaster	1. School staff leadership, accountability
2. Jorge Chica	2. Parent	2. Representing target students - Hispanic
3. Abdi Moalim	3. Parent	3. Representing target students- Somali

4. Mohamed Wadi	4. Director of Community and Parental Involvement	4. Representing community and parent involvement
5. Nata Samb	5. Academic Dean	5. Cross grade level experience
6. Faysal Ali	6. Director of Programs	6. Program coordination with MCA data
7. Chris Nevin	7. Director of Volunteer Programs	7. Community connections to SIP
8. Rosalinda Armendariz	8. Student Services Coordinator	8. Parent liaison
9. Stephanie Wheelock	9. English Department Chair	9. Reading resource
10. Emina Peljto	10. Math Department Chair	10. Math resource
11. Christianna Hang	11. MDE External Provider	11. STP facilitation; support and compliance
12. Dr. John Eller	12. MDE External Provider	12. SIP facilitation; support and compliance
13. Dr. Jonnie Gallinger	13. MDE External Provider	13. SIP facilitation; support and compliance

3. **For AYP:** Please attach information about your external provider. Include rationale for selection.

Using the MDE website with the listing of approved External Facilitators, we chose Christianna Hang specifically because of her experiences working with ELL students. She informed us that she worked in a team that included two other MDE trained facilitators, Dr. Jon Eller and Dr. Jonnie Gallinger. The team met with us on October 11, 2005. Joel Gibson AND TWO OTHERS met with the team and discussed how we could quickly move forward. It was decided at that time that Ms Hang would go to the Data Walk on Tuesday, October 25th and Dr. Eller would go with them on Wednesday, October 26th. After this initial meeting our Improvement Team had faith that this MDE team would be able to work with us in our short timeline to complete the SIP as required. N

II EXTERNAL PROVIDER

Please provide the name of the external provider selected to work with your school, along with a brief rationale for selecting this person to work with your school. If the external provider you have selected has not posted information on our website, please include contact information for the external provider as we will request a resume from him or her.

4. **To be completed by each school applying for CSR Grant:**
Select a Model Provider:

CSR expects that model reform programs with a demonstrated record of effectiveness will be adopted for school reform. Schools may select a model reform program and provider. Based on the school's needs assessment, one model provider may be more suitable than another. The *Catalog of School Reform Models* found at http:/www.nwrel.org.scpd/catalog/modellist.asp provides a list of research based proven model providers. A school should have been in contact with its preferred model provider before completing the application of CSR funds.

Describe how your school will use high-quality, external technical assistance throughout the implementation of your comprehensive school reform plan. If using a model provider, explain what assistance your school will receive and how it will help improve the quality of your reform effort. Provide a description of the expertise an external model provider has, particularly as it relates to working with comprehensive school reform. Include as an attachment a letter of agreement to serve your school. If not using a model provider, explain how your school improvement model is based on scientific research.

Explain the process employed by your school to select a model provider and/or effective research-based programs to improve academic achievement.

V. LEADERSHIP TEAM INFORMATION *(continued)*

5. Engagement of Staff: Explain the way your leadership team relates to the staff in order to build support for implementation of the school improvement planning process. Describe the steps taken to gather widespread support of teachers and staff for the improvement plan. Include a description of how you will maintain this support throughout the implementation of your improvement process.

Because Lincoln International High School (formerly Abraham Lincoln) was designed to be an alternative school for students new to America, staff and faculty have become vital members in the school improvement process. The staff and faculty are involved with the leadership team through department heads (i.e., content areas). The leadership team meets twice-weekly to review plan objectives, evaluate the goals as they relate to the latest information coming from most recent performance outcomes of the students, and to develop more effective methods of meeting our achievement goals. The entire academic staff meets monthly to discuss various parts of the plan and they are encouraged to make suggestions that will enable the school to reach our goals.

VI. PROGRAM SUMMARY

School Program: Overview: Provide a concise summary of the following components of your school

program and describe how each is observable in the classroom for increasing student core academic performance, attendance and, if applicable, graduation rates.

1. Leadership and Expertise of Current School Staff:

The teaching and administrative staff are a blend of American and Immigrant/refugee personnel that are very highly educated. All classes are designed as either English immersion or with an underlying ELL framework. The staff strives to serve as role models for students and provides a foundation to blend their cultural heritages with the American educational experience. This enables the students to operate with an increasing sense of self-assuredness. Academic performance is linked with English proficiency. Cultural advisors work with students on improving attendance by providing coping skills for domestic issues.

2. High Quality Staff Development/Current Program Design for Teachers, Administrators and Other Staff:

Starting this 2005-06 school year we have been implementing quality staff development and training in order to improve academic performance, attendance and graduation rates. Examples include ELL training for the entire staff, yearlong SIOP training from the District, technology training such as Quizdom, which allows direct student feedback during class sessions, as well as parent involvement which could be increased through a variety of new strategies.

Faculty Development Plan for Working with English Language Learners Center for Second Language Teaching and Learning, Hamline University

I. All Staff Training from Hamline University ELL Staff
The dates were during this academic year and we have been working with them since May 2005.

Activity	Dates and Time	Person Responsible
Consulting and Preparation	May 24th 10 to 11:30, June 14th 10:30 to 12, June 28th 2:30 to 4 July 14 (2 hours) Total 6.5 hours	Ann Mabbott, Ph.D. Center for Second Language Teaching and Learning Hamline University Graduate School of Education
Working with ELLs: second language acquisition and making instruction comprehensible	August 17,2005 5 hours	Ann Mabbott
Increasing Parent Involvement	August 22, 2005 2 hours	Mary Diaz, Associate Professor, Center for Second Language Teaching and Learning Hamline University Graduate School of Education

II. Specific Professional Development Work for Specific Staff

Teaching the Language of Math	Aug 16, 2005- 1.5 hours Oct 5, 2005 1.5 hours	Kathryn Heinze, Associate Professor, Center for Second Language Teaching and Learning Hamline University Graduate School of Education
Teaching the Language of Science and Social Studies	Aug 16, 2005- 1.5 hours Oct 5, 2005 1.5 hours	Bronwen Lu, Teacher St Paul Public Schools
Developing Literacy Skills in a Second Language	Aug 16, 2005- 1.5 hours Oct 5, 2005 1.5 hours	Cindy Lundgren, Associate Professor , Center for Second Language Teaching and Learning Hamline University Graduate School of Education Martha Bigelow, Assistant Professor, University of Minnesota Curriculum and Instruction

III- District directed Training Staff Development for all departments

August 26, 2005: Special Education and ELL, Linda Huntzicker Special Education teacher and District Liaison Minneapolis Public Schools District

August 30, 2005 and ongoing until January 2006 ELL Training SIOP
October 20 MEA State Conference

November 4, 2005 Training for the use of Quizdom

SIOP Training since August, 20005 for all departments by Gustavo. Lanata, Minneapolis District SIOP Trainer, District ELL support ELL Training,: Choua Yang, Secondary ELL Coordinator

3. Parent and Family Involvement/Current Model and Results:

The school currently has a strong parent advocate program which includes the position of Director of Community and Family Involvement and three cultural advisors, i.e., Spanish, Somali, and Oromo/Ethiopian. The vision is to allow for unique opportunities of learning and experiential learning activities through community partnerships. Some activities include:

Parent teacher conferences twice each year

Progress reports - teachers discuss student progress with parents throughout the school year

Graduation ceremonies that involve the larger community and impact upcoming students

Parental involvement with attendance issues

Culture talent shows involving students and community members to build a sense of belonging for both students and community members

Focus groups to identify and provide interventions for specific needs

The Community Partner Program also includes a Tutoring/Mentoring program that works throughout the year to recruit, screen, train, place and supervise caring and compassionate community volunteers as well as service learners to fulfill positions for tutoring and mentoring support for LIHS students. Other community program focus include the following partnerships:

St. Thomas University: 70 students during the fall semester of 2003 and 90 during fall of 2004, and more than 100 students in 2005, to work collaboratively with college students on creative projects

Children's Theatre Company: January 2005, eight outstanding students were able to receive scholarships to partake in a two-week long theatre workshop given by a renowned playwright.

Breck School: Offers peer-to-peer tutoring support, donations of books and school supplies through special drives organized by Breck students, and regular invitations to LIHS Student Council members to participate in the annual conference to commemorate the life of Dr. Martin Luther King. Also, this past year a special drive by Breck School collected almost 20 prom dresses to donate to students for their celebration.

Other areas include:

The America Reads Program at the University of Minnesota provides tutors from the Somali, Oromo, and Spanish speaking communities.

Page Foundation and Wallin Foundation Scholarships to support our students as they continue their education

Result: The school has many events and opportunities for parental involvement, however there is a need to do more to get parents to involve in the school events and academic of their children.

Advantage: The cultural advisor serves as a key to assist families and students during the initiate registration process

Through the cultural advisors:

parent are able to understand their child's academic progress

provide resource and connection for parents

provide a bridge for language barrier

communicate feedback between parents and teachers

Goals: Increase the number of parents/family members that attend school functions each year.

- For those students who live with parents or family members (not emancipated) increase parental/family involvement in school activities or celebrations by a total of 5 more attendees each year.
- Increase the number of parents/family members that attend formal parent-teacher conferences by 10 each year.

4. Academic Programs (Instructional models employed for all students [e.g., ELL, migrant, SPED, Title I, Gifted and Talented, Mainstream] according to the MN State Standards Content Areas: Arts, Math, Language Arts, Science, Social Studies):

Concerns: There is no school-wide program to address the MN standards across the curriculum. Individual teachers are provided support on the MN standards and are directed to use the standards in their curriculum planning and lesson plans. We are currently working on implementing programs to help teachers identify and address students with possible special education needs in a way that allows adherence to standards.

Goals: The development of a formalized framework for instruction and assessment, site-based data gathering, analysis and outcomes will be compared to state outcomes per gap students; staff development will continue to be implemented with a new focus and direction beginning December 2005 and continuing through June of 2006. Extensions of staff development will be through 2008 to ensure goals listed below are monitored and met.

VI. PROGRAM SUMMARY *(continued)*

5. School Climate and Classroom Management:

School Climate:

Based on focus groups and student surveys, students have been recorded as saying that Lincoln International is a safe school that is welcoming of all cultures and respectful of diversity. This is experienced through close connection with teachers and the cultural diversity of the staff itself. Students report that they do not feel threatened in this school on the basis of being a minority.

There is some sense that some students and members of their respective communities experience Lincoln as being less academically challenging because teacher are trying to address the LEP of students by not pressing too hard academically. Still other students have been recorded as saying the school is challenging and teachers are not giving up on them.

Students also say that they like the respectfulness they experience here from the staff and through special programmatic adjustments such as quiet time on Fridays when students can either study or have private reflection time.

Classroom Management:

Enforcement of the school Discipline Policy appears to be at the discretion of each classroom teacher. There is some attempt to address this potential disconnect.

6. Technology (Describe how the school will use technology to support the Improvement/Reform effort.):

Lincoln High School will be developing local Technology Standards to implement across the content areas (spring 2006). When these standards are approved by the School-wide Improvement Team, a technology plan will be developed to ensure all students are proficient with current technology through graduation.

Currently, technology is a central learning tool at Lincoln High School. There are 3 computer labs with approximately 80 computers. There are 50 LAP-TOP computers that are mobile and available on a cart to be used in the classrooms. In addition, most classrooms have sets of computers.

There is a heavy emphasis on computer technology for those students who come to our school with little or no English proficiency. The lab is set up to provide initial assessments of language skills and to provide a process for increased abilities. This leads to a steady improvement of their English proficiency.

The school will implement new and immerging technology to increase Parent/ Family involvement and Staff Development.

Parent/Family involvement:

Phone Tree: an automatic Multilanguage Voice Communication System. It is available for call-in and call-out in Multiple languages.

Edline: Online portal where families and students can log on to check grades, announcements, homework, discipline .etc.

Biweekly paper format Newsletter.

Staff Development:

Training will be provided for teachers and staff in the following areas:

Grade Quick: student management software program for the classroom teacher.

School Minder: student accounting and attendance report.

Qwizdam, interactive direct student feedback that lets the teachers communicate with their students during classroom sessions, instantly by using a remote control device.

CCC Lab, allows students to interact in the lesson

NCLB aligned Curriculum and reporting

Academic:

CCC Lab (computer curriculum), NCLB aligned Curriculum and reporting provides direct individual learning in the areas of science, math and English.

Start Math, Star Reader, Accelerated Reader, Math Skills, Qwizdom, SAT, ACT, TOEFL. Classrooms have computers with high speed internet and Digital Projectors where teachers can show their lessons visually.

Target: To organize the technology programs under one framework – a scope and sequence of Technology standards and student outcomes that are aligned with the software and process programs to ensure school wide implementation of the same plan - to use technology to increase student achievement on the MCA II.

7. What was the success of your previous plan? What were the impediments, if the plan did not succeed?

Increasing and celebrating student achievement was a primary goal. Partial success on increasing achievement was reached by further interdepartmental collaboration to ensure continued improvement. We will be implementing a more rigorous formalize framework for department accountability for instruction and assessment. The goal of developing strategies to ensure a continued, safe, supportive, and respectful environment was reached, aided in great part by the move to the new (current) facility. One goal, providing a Student Handbook in Somali, Oromo, French and Spanish was reached this fall. New

students have been provided the newly translated Handbook and it will be distributed school-wide in January 2006, with the semester report cards.

There has been greater communication with parents and family units through increased communications with the home. Communications must address information in many the Somali, Oromo, French and Spanish languages.

Staff development goals were not met, due to a new principal and the process of analyzing the needs of the students and the staff. There will be a fully implemented staff development plan framed on standards-based instruction and assessment; identification of student needs and strategies to meet those needs; monitoring of compliance by teachers and adherence to goals written in plans and grants, etc.

Available data (see below) demonstrates the need for school-wide improvements (according to the School-Wide Plan submitted in 2005) and the goals delineated in this SIP. Goals and Targets must be monitored to ensure compliance and analysis of expected outcomes.

An ongoing concern is family involvement. Because our families come from so many different cultures and communities, we do not have a "neighborhood" group of involved parents. While our families always express strong support for the school programs, we must always strive to provide opportunities for parental involvement based on timing, content, environment, and length of specific events.

8. Provide a brief, coherent narrative snapshot of the school in one page (approximately 600 words); including at least a summary of the school's mission or vision in the statement. Write the Summary as if you are communicating with the school community (parents, teachers, other) in a district newsletter. Focus on the transition from where you are to where you are going.

   The Mission of Lincoln International High School is to provide an ethnically diverse English immersion environment of knowledge, recognition, and healing for refugees, immigrants and other disadvantaged students.

   Organized in 1996 as a contracted alternative high school in the Minneapolis Public School District, Lincoln has grown to become one of the largest alternative schools in the state. It currently serves about 250 immigrant and refugee students. They come from 20 different countries and speak 16 different languages.

   At any given time the students at Lincoln are at least 95% Limited English Proficiency. For many of them, this school is there first formal educational experience. A good number of them are not literate in their native language and live in households that experience the same limitation. At the same time, there are students who had various levels of education in other countries, some up to high school. Some of these students, while having LEP, speak three, four or more other languages and are quick learners. The average age of the student body at Lincoln is 18.5 years old. It is not unusual for a large

number of Lincoln students to be coming to school for the first time at the age of 17, 18 or 19 years. Up until most recently new student arrivals at the school have been placed in the grade closest to their age rather than at the level of their academic proficiency.

Programmatically, Lincoln International High School was originally set up as an English immersion school. All classes were and still are taught exclusively in English. Most students have at least one hour of extra ELL course work each day in addition to their regular course of study. Additional tutorial support before, during and after school is provided for any students who desire it to assist them both in their English proficiency as well as other support in other course work.
All students are required to fulfill all the Minnesota state requirements for graduation before they can receive a diploma.

The teaching staff at Lincoln is comprised of teacher representing 13 different countries. They speak 27 different languages. This is a great aid in helping students with limited or no English proficiency get a foothold in understanding the expectations and instruction in their early classroom experiences.

The school offers the unique support system of a set of cultural advisors who work first to assist the students in choosing the right school to meet their educational needs. They help those students who choose Lincoln to register, understand the expectations and requirements

of high school education, and to figure out how to work with each teacher and program support. The cultural advisors also serve a valuable service in relating to the home situations of the students and communication with family members. Often this staff works to help the students and their families with needs outside of school that have an impact on the student's ability to functions successfully inside of school.

VII. COMPREHENSIVE NEEDS ASSESSMENT

Complete each section as directed.

A. Enter the percent of students in each category from the most recent reliable enrollment count.

Ethnic Group	% Free and Reduced Price Lunch	100% Limited English Proficiency	% Special Education	% Migrant
American Indian				
Asian	100%	100%		
Black	100%	99%	.004	
Hispanic	100%	98%	.004	
White				
TOTAL	100%	99%	.008	

B. Describe how you address the needs of highly mobile students, particularly migrant students.

There are no migrant students attending Lincoln High School, but we have a highly mobile population. Student mobility is based on the needs of families seeking employment opportunities and may need to move more than one time during a school year. Because we are an Alternative High School, student transportation can be a factor in the low attendance rate.

Many of our students are immigrants from other parts of the world and their families may not have decided to settle in to Minneapolis and this may be a stopping off place as employment and other issues are addressed by the family or supporting guardians.

The daily schedule will be an issue that must be addressed at the school site as well as district level. We strive to ensure students will be enabled to attend on a regular basis in spite of the work or family issues they may face.

VII. COMPREHENSIVE NEEDS ASSESSMENT
(continued)

[*Fold-out exhibit, see next four pages*]

V I I. COMPREHENSIVE NEEDS ASSESSMENT *(continued)*

C. Student Assessment Data – MCA Data Analysis

What conclusions have you drawn from your review of data (including sub scores) from the School Report Card?

Data Conclusions	What is the gap?	How is this referenced in the School Improvement Plan? (Complete after performance targets/strategies have been determined.)
Subgroup All students: 2005: 10th grade reading 89.23% scoring in levels 1 & 2; district scores were 44.1 in levels 1&2. 11th grade math 79.59 scoring in levels 1 &2; district scores 50.75 in levels 1 & 2. LHS levels 3-5 20.41%, district 49.24	Levels 1&2 3-5 10th reading 89.23 10.77 11th math levels 79.59 20.41 Minneapolis 10th reading 44.1 55.8	All instruction must be based on 2 specific points. 1. The MN content standards must be presented and assessed in each content area. 2. The needs of the ELL population must be addressed through a modification of instruction of the MN content standards
Subgroup Hispanic READING - 56.68% in Levels 1 & 2 MATH – 68.45 in Levels 1 & 2	Average scores school district state 10th reading 43.12 51.11 58.83 11th math 31.55 37.35 40.0 READING 10th Grade Highest to lowest school district state 1. Literal/explicit 53.8 61.0 67.6 2. Technical reading 53.3 61.1 70.1 3. Main idea 51.9 59.7 67.0 4. Bias/point/fiction 45.5 48.5 56.2 5. Complex info. 41.4 49.5 56.8 6. Interpretive/anal 39.5 47.5 55.0	Targets for Hispanic students will be Reading: focus on complex information and interpretation and analysis sub domains. Students need to learn how to break down more difficult reading and do overall analysis. Math Focus on technical applications & chance and data sub domains. Students need to improve their academic English and build on their previous schooling to be able to read, interpret and answer English laden math problems.
Subgroup Black African READING - 66.28 % in Levels 1 & 2 MATH – 70.27 in Levels 1 & 2	Average scores school district state 10th reading 33.72 49.7 53.7 11th math 29.73 34.62 36.11 READING 10th grade Highest to lowest school district state 1. Literal/explicit 42.6 59.1 62.5 2. Main idea 41.0 57.8 61.4 3. Technical reading 36.8 58.5 63.8 4. Complex info. 33.5 48.2 51.9 5. Bias/point/fiction 30.8 46.5 50.6 6. Critical/eval 29.7 43.2 47.3 7. Interpretive/anal. 29.5 45.4	Targets for Black students will be Reading Focus on main idea and literal/explicit sub domains. Students need to build on their basic reading strategies. Math Focus on discrete math and technical applications sub domains. Students need basic math skills to bring them up to the appropriate grade level. Many of these students have not had formal education before arriving at LHS. Students need to improve their academic English and build on their previous schooling to be able to read, interpret and answer English laden math problems.

Subgroup LEP = 99% of students (African and Spanish) READING – 64.12 in Levels 1 & 2 MATH – 70.61% in Levels 1 & 2	Average scores school district state 10th reading 35.88 44.23 49.16 11th math 29.39 33.88 35.39 READING 10th grade Highest to lowest school district state 1. Technical reading 40.5 53.5 61.0 2. Literal/explicit 45.2 53.6 58.8 3. Main idea 43.5 51.7 57.2 4. Complex info. 35.4 42.7 47.0 5. Bias/point/fiction 34.4 42.2 46.3 6. Interpretive/anal 31.5 40.0 44.6 7. Citical/eval. 31.2 37.5 41.7 8. Analyze/eval. text 25.0 32.4 36.3 MATH 11th grade Highest to lowest school district state 1. Discrete math 43.8 51.5 52.5 2. Chance and data 31.9 36.9 38.2 3. Shape, space, measu 26.3 36.0	ELL strategies need to be implemented in each classroom across the content and curriculum. All faculty must have a repertoire of strategies to provide support for students to know and understand content based on the MN standards. Reading: Focus is on main idea – how to find the main idea. Strategies including checking the title, outlining reading, graphic organizers, etc. Second topic is literal/explicit – focusing on developing vocabulary. One of our strategies is to build cross-curricular vocabulary lists, so vocabulary can be reinforced in all classes. We also need to motivate them to read after school (tutoring program, visits to the library), work on the accelerated reader program, do regular silent reading time (more than just our once a week school-scheduled time). All of this should be reflected in lesson plans. Math: Focus on improving academic vocabulary for students to understand and be able to master content in math narratives. This should also help with discrete math and
Subgroup FRP = 96% of students (African and Hispanic) READING – 63.8% at Levels 1 & 2 MATH – 69.03 at Levels 1 & 2	Average scores school district state 10th reading 36.20 52.14 61.82 11th math 30.97 37.54 43.08 READING 10TH Grade Highest to lowest school district state 1. Literal/explicit 45.7 61.8 70.8 2. Main idea 44.1 60.3 69.9 3. Technical reading 42.1 62.6 73.8 4. Complex info 35.6 50.3 59.6 5. Bias/point/fiction 35.3 49.0 58.9 6. Interpretive/anal 32.4 47.6 57.4 7. Citical/eval 30.3 45.0	Students from low socio-economic backgrounds and new to America do not have a large repertoire of information to use to guide them through content areas; special emphasis needs to be on providing enrichment experiences to build stronger vocabularies and connections to the world through the MN content standards.

V I I. COMPREHENSIVE NEEDS ASSESSMENT *(continued)*

D. Other Non-MCA Student Assessment Data Analysis

List additional data gathering tools (district, school, and classroom assessments for all students as well as ELL, SPED, Migrant) used by your school/district and describe the results of this review. Do these tools support conclusions from the state assessments? Do these tools reveal other needs?

TYPE OF ASSESSMENT	CONCLUSION	**How is this referenced in the School Improvement Plan? (Fill out after performance targets/strategies have been determined.)**

BST		%
N		
READING		
9th	10.0	1
District	39.5	
10th	7.4	4
District	39.5	
11th		36.7
18		
District	43.4	
12th		27.5
16		
District	36.6	
MATHEMATICS		
9th		0
0		
District	20.5	
10th		7.5
4		
District	19.6	
11th		17.5
7		
District	18.4	
12th	16.0	9
District	25.0	
WRITING		
10th	21.8	12
District	77.5	
11th	28.8	13
District	56.7	

Student Response Surveys
11th grade students
Administered February 2005
60 students surveyed or 98%

9th New Immigrant. LEP - new to the country. No formal Education. New to the system and the culture here.

10th. High level of language difficulty. Lack of English interaction. External responsibilities (work, family...).

11th Low expectations of students by faculty which may allow them to be at low academic standards. Need to be teaching more responsibility or providing guidance.

12th. Students do not understand of the impact of high school diploma on their future opportunities. We need to allow more opportunities for students to own responsibility /expectations. Some students expect a diploma after a short attendance period.

From 9th to 12th graders, we need to have the same expectations. We tend to be flexible on accountability.

Results include *Agree + Strongly Agree*
I am proud to be a student of this school.
96%
I feel safe in my school
95%
I trust adults in my school to keep me safe
93%
Crime and violence are problems in the neighborhood surrounding my school
20%
Students of different races work well together
97%
I am learning a lot in my school
96%
My teachers have high expectations for me
90%
Most of my teachers teach their subjects in ways that make me want to learn

Actual student outcomes are provided in the SIP, goals for staff development and training are based on increased student outcomes.

Attendance rates for all subgroups must be addressed. Measurable, manageable goals must be identified, implemented and monitored to ensure progress toward the overall goal of student achievement.

As attendance rates improve, scholastic attainment and acquisition of skills based on the MN content standards will improve. When students are attending and learning, the graduation rate will improve

It appears that Lincoln International High School provides a highly nurturing and safe environment for all students. The faculty, administration, and support staff strive to ensure all students feel safe and welcome. They also strive to address parental and family issues that may tend to exclude communications between the home and school.

The lowest score reflects student perceptions that family members have not spoken to a school counselor – which is not a negative.

VII. COMPREHENSIVE NEEDS ASSESSMENT (*continued*)

E. Summary of Quality Indicators. Compile the results of a school-wide discussion.

1. School has no system-wide approach. Some staff may address this area.
2. School is developing a system-wide approach.
3. Approach fully developed. Implementation under way.
4. Approach fully implemented.
5. School has evaluated and improved its filly implemented approach.

I. Curriculum (Reading and Math)	**1**	**2**	**3**	**4**	**5**
A. Alignment of curriculum to state standards and assessments (test specifications)		X			
B. Staff understanding of the research that underlies and supports the school's curriculum		X			
C. Alignment of curriculum to address diverse learning levels and styles and diverse cultures		X			
D. Staff understanding of school-wide curriculum, especially of grades just above and below		X			
II. Instruction (Reading and Math)					
A. How staff identify and develop instructional strategies effective in helping students learn		X			

B. How staff vary instruction to address diverse learning levels, styles, and cultures		X			
C. How staff accelerate progress of students who are below grade level	X	X			
D. How staff build relationships with students to help them become actively engaged in learning		X			
E. How classroom staff and various specialists collaborate to enhance student learning		X			
III. Assessment and Use of Results					
A. How school and staff analyze and use the results of MCA's and other standardized tests to identify areas for improvement in student learning and teaching	X				
B. How staff use Examining Student Work and other formative assessments to identify areas for improvement in student learning and teaching		X			
C. Degree to which classroom assessments evaluate the skills and concepts required by standards		X			
D. Whether the school uses comparative data to identify strategies for improvement	X				
IV. Staff Development					
A. How the school selects content for staff development relevant to improving student learning		X			

B. How the school creates a culture of learning among the staff		X			
C. How school leadership supports an environment for staff development		X			
V. Engaging Families and Community					
A. How staff learn about the diverse expectations, values, and cultures of the students' families		X			
B. How staff and school communicate with families and engage them as partners in the education of their children		X			
C. How the school forms partnerships with the community to enhance the learning of the students		X			
D. How the school gathers, analyzes and uses feedback born students, families, and community	X				
VI. Leadership and Governance					
A. How leadership sets direction for the school		X			
B. How leadership creates a culture and systems that lead to high levels of learning		X			
C. How leadership reviews and analyzes progress of the school in achieving its objectives and uses the results of the review for improvement	X				
D. How leadership communicates achievement goals and results to all stakeholders	X				

VII. Planning and Resources						
A. How the school plans		X				
B. How the school allocates resources		X				
C. How the school makes decisions		X				

VIII. Which of the indicators that reflect a score of 1 or 2 has your leadership team addressed in the plan's performance targets and strategies?

Nearly 100% of the indicators are in the levels of 1 and 2: Curriculum, Instruction, and Assessment; Staff Development; Engaging Families; Leadership; and Planning. Lincoln International School plans to implement strategies that address components in 3 quality indicator areas: Curriculum, instruction and Assessment for Hispanic, Black and LEP students. These 3 areas are the focus for the strategies listed in the SIP connected to the target goals. The SIP reflects the need for Lincoln to address first attendance, then curriculum and third, assessments connected to the MN content standards and compared to state outcomes.

Curriculum

A. Teachers use state standards to plan curriculum, course outlines, and learning activities. Teachers currently use example MBST questions with students to prepare for the test and to help in planning activities for students in class. We have not looked at the MCAs as a group to make sure all topics/ideas are integrated yet. We discuss test preparation in our English department meetings, so teachers are aware of how each of us is preparing students for the test.

B. There has not yet been time to go over in detail the scope and sequence with our new staff members. One department chair is new this year and the only files left behind were course outlines and an overview of the English department curriculum. We review the ELL and Language Arts standards to make sure the students are progressing through the levels. Observations are set up for at least once each semester (by the chair of the depts). Most teachers submit a detailed week-by-week course outline, so scope and sequence can easily be tracked. The departments meet bimonthly.

C. There is no formal assistance for new staff members to get to know the cultures of our student body. We have discussed several staff development options. Teachers are encouraged to attend local cultural events and are given information about seminars, etc. in the area. Each department had two training sessions this fall to learn more about literacy. The expert brought in is very familiar with the Somali community, and she shared many resources with the departments.

Department met Teachers address different learning styles by offering assessment choices to students (e.g. presentation, test, writing, etc.). Some teachers also use assessments with different levels (students can choose the A, B, or C levels to show their level of understanding of a subject). Teachers are encouraged to find materials to challenge all the students and to use different work within a single class if the levels are not similar

Strategies:

Projects related to country of origin

Group work and mixing students from different countries

Computer-lab to visit websites related to subjects

Presentations and lecture

Math video tapes

Manipulatives

Projects related to the community

Development of posters according to guidelines

D. Departments meet twice a month to discuss classes, texts, and how to best meet students' needs. Curriculum will be reviewed as a team at least three times a year to ensure all information is being taught on the appropriate levels. Teachers often meet and share information at the beginning of the school term, so that teachers will know their incoming students' needs.

Currently, we are developing a plan to ensure cooperation, collaboration and corroboration on implementing the MN standards for reading, writing, math, and science. Other disciplines will be trained to use "Reading Across the Curriculum" based on the MN reading standards. All disciplines will be accountable to address the MN standards; all faculty will be

stakeholders in the level of student achievement based on MCA II outcomes.

Curriculum Support:

Mathematics Basic Standards Preparation Materials

Passing Minnesota Basic Standards Test (American Book Company/Woodstock, Ga.)

MCA samples from previous test questions

ACT samples and CD

Websites;

www.billtowne.com

www.classroom2000.com

Instruction

A. Staff members are encouraged to share their ideas and what is working/what is not with their colleagues in staff meetings. Teachers also collaborate with Social Studies teachers (in particular) to do cross-curricular work to improve students' understanding.

B. Staff identifies learning styles through observation. Staff learns about the different cultures by talking to the students, having them write/speak/share cultural information, by doing research, by meeting with our cultural advisors and multi-cultural advising and teaching staff.

C. Our situation is unique. Our ninth grade students are in their first year of school in the US and possibly their first year of school in their lives. Saying a student is a ninth grader in our school does not mean they read/write/do math at the ninth grade level. Some of them are beginners with English and all other subjects.

Students are offered tutoring opportunities in class, before and after school. Summer school courses are offered.

Students are given the TEAE test in spring and fall, assessments from their textbooks in spring and fall, as well as state mandated tests.

D. Active engagement is when all students are actively involved in the classroom, contributing and learning. Students are actively engaged when they have the background needed for the lesson, when they are self-motivated and motivated by the teacher's style, when the topic seems interesting and appropriate for them. Teachers try to connect their lessons as much as possible with prior knowledge and learning situations, trying to draw out what students already know.

E. Collaboration across grade levels is done within the English department. Some collaboration is done across subjects. There should be more time and resources given to properly support a collaborative environment.

Assessment

A. Teachers are currently using the MBST test to align to classroom instruction. Teachers do set individual goals for students to improve skills when

applicable. Administration and teachers need to shift from MBST outcomes and target the student outcomes on the MN content standards and the outcomes on the MCA II.

B. Teachers break down assignments by their degree of difficulty, starting with the simplest concepts, and increase difficulty until students can show mastery of skill. Teachers constantly monitor and adjust strategies and assessments while working with students.

C. Assessments were aligned to standards while curriculum was being written. Standards are revisited often to ensure progression.

D. Teachers analyze how we might improve our instruction to attain other (school, district, state) levels. Staff meets with other schools similar to ours to exchange ideas, compare strategies, and develop solutions.

E. Teachers will be trained to develop their school-site framework for instruction and assessment accountability; using curriculum maps and guides to ensure all MN standards benchmarks are presented; write standards-based lesson plans (across the curriculum), and identify formalized assessments to collect valid data from site-based assessments and to compare data with state outcomes - identify learning goals, monitor, adjust.

Professional Development

A. Our staff development plan is not clearly outlined for teachers. We are currently working with a team

from Hamline to help teachers in using ESL instruction and best practice for all classes. We are also working with members of the Minneapolis district to bring in Sheltered Instruction to our classroom. We meet with a member of the team about once a month and bring in lesson plans to utilize what we are learning.

B. We need more time set aside for inter-departmental collaboration. Teachers need to know what is being taught in other classes so they can support students' learning. Action research is an excellent tool for improvement. Teachers are not all familiar with this method and would need support to implement this system for changes.

Teachers give feedback after each staff development session. It is gathered by school administrators.

C. Staff has been asked to brainstorm and discuss ideas for staff development several times so far this school year. Teachers under stand which staff development items are mandated by the district and, for the most part, why they are being used. Our current school calendar allows for staff development tune fairly regularly. After school time has also been used. I would suggest using shorter blocks of time, possibly allowing students to be released after 4th period to allow a 3 hour block of time for staff development.

Note: If your district has a template for improvement planning, it may be substituted starting with this page, provided all components are addressed.

VIII. PERFORMANCE TARGETS AND RATIONALE

What targets have been selected based on your comprehensive needs assessment? (Performance targets must be specific, measurable, achievable, reasonable and time-limited and must strengthen the core academic achievement of ALL children in the school with specific attention to population subgroups not making AYP.) Your leadership team determines the number of performance targets.

Performance Target: READING Limited English Proficient Students - 99% of school-wide population. Incoming 9th graders that stay at the school site will improve reading performance on the 10th Grade MCA II by 10% each year in Levels 3, 4 and 5 for years 2007-2010 (2005 reading MCA proficiency = 10.77%)

Rationale: 2004-05 LEP subgroup did not make AYP 2004-05 Comprehensive Needs Assessment indicates for ALL students, 89.23% scored in Levels 1 & 2. Hispanic students, 56.68% scored in Levels 1 & 2; Black (African) students, 66% scored in Levels 1 & 2.

Performance Target: MATHEMATICS Limited English Proficient Students -99% of school-wide population. Incoming 9th graders that stay at the school site will improve mathematics performance on the 11th Grade MCA II by 10% each year in Levels 3, 4 and 5 for years 2007-2010 (2005 math MCA proficiency = 20.4 1%)

Rationale: 2004-05 LEP subgroup did not make AYP

2004-05 Comprehensive Needs Assessment indicates for ALL students, 79.59% scored in Levels 1 & 2. Hispanic students, 68.45% scored in Levels 1 & 2; Black (African) students, 70.27% scored in Levels 1 & 2.

Performance Target: Subgroup - ALL students ATTENDANCE and GRADUATION
2004-05 attendance rate of 84% (mostly due to student mobility) is not acceptable.
Attendance rate will improve 2% per year to meet state requirement of 95% by 2010
2004-05 Graduation rate of 18% is not acceptable
Graduation rate will improve 15-20% each year to meet state requirement of 90% by 2010.

Rationale: If students are not attending classes, state test scores will not improve. If state test scores for these students do not improve, students will not be allowed to graduate. Graduation from high school and a diploma provides opportunities for life-long learning and social advancement - these 2 values must be addressed.

Performance Target:

Rationale:

Performance Target:

Rationale:

IX. STRATEGIES AND WORK PLAN
Complete this section for each of the Performance Targets listed in Section VIII

[*Table begins next page*]

Performance Target: READING Limited English Proficient Students - 99% of school-wide population. Incoming 9th graders that stay at the school site will improve reading performance on the 10th Grade MCA II by 10% each year in Levels 3,4 and 5 for years 2007-2010 (2005 reading MCA proficiency = 10.77%)

STRATEGIES What will you do to meet the performance target in instruction?	What will you do to meet the performance target in curriculum?	What staff development will meet the performance target?
Ensure that all teachers are trained to use the MN reading standards across the curriculum	Provide staff development time to development 9-12 framework for instruction and assessment	Training sessions to address needs of ELL students for reading decoding, comprehension; use of MN ELL standards
Ensure all teachers are trained to focus on sub domains on the reading test; how to address those domains in their content areas	Provide glossary of definitions of each domain criteria, i.e., literal/explicit etc. so that all staff are using same definitions; provide copies of MN ELL standards for each teacher	Provide ELL strategies for all teachers connected to the sub domains of the MCA II; train teachers to use glossary of definitions in their lesson plans

What parent' family involvement will reflect the performance target?	Who is involved?	When will this be done?	What resources or technical support is needed?
Parent/ Family Teachers Association P/FTA) will provide at risk student training for parents and family members in their languages	Consultants Administrators Teachers Parents P/FTA members	Beginning 12-05 through 6-06 and beyond	Consultants will provide
P/FTA will provide information concerning domains to parents with strategies to use at home	Consultants Administrators Teachers Parents P/FTA members	Beginning 12-05 through 6-06 and beyond	Consultants will provide materials and support

Develop framework for reading/ writing accountability for instruction and assessment	Provide time for content teachers to meet with consultants to develop scope and sequences for instruction and assessment for 9th-12 grade; monitor through lesson plans, curriculum mapping and assessment identification and data	Release time to work on content level scope and sequences; teachers are primary stakeholders
Ensure all teachers are trained to use MN ELL reading standards and ELL strategies	Provide staff development based on ELL reading standards and strategies; implement across the curriculum	ELL strategies across the curriculum
Use formative and summative data to monitor student progress	Train administrators and teachers to gather, analyze and use formative and summative data to monitor progress of ALL students and NCLB categories	Data training to ensure all teachers know and understand the impact of daily classroom instruction based on MN content standards

Provide information of accountability level of students at P/FTA meetings	Consultants Administrators Teachers P/FTA members	Beginning 12-05 through 6-06 and beyond	Consultants will provide JUMP DISK with all formats; formats will be housed on the site Intranet; administrators and teachers will have access to scope and sequences, lesson plans, mapping documents and assessment protocols
Provide information concerning ELL strategies at P/FTA meetings	Consultants ELL experts Administration Teachers P/FTA members	Beginning second semester through 6-06 and beyond	Consultants and experts will provide materials
Provide simplified training to P/FTA members	Consultants Administration Teachers P/FTA members	Beginning fall 2005; spring 2006; June 2006 and beyond as data is available	Consultants Administration will gather data from MDE website and other data from program outcomes

Performance Target: MATHEMATICS Limited English Proficient students -99% of the school-wide population. Incoming 9th graders that stay at the school will improve mathematics performance on the 11th Grade MCA II by 10% each year in Levels 3, 4 and 5 for years 2007-2010 (2005 math MCA proficiency =20.41%)

STRATEGIES What will you do to meet the performance target in instruction?	What will you do to meet the performance target in curriculum?	What staff development will meet the performance target?
Ensure that all teachers are trained to use the MN math standards across the curriculum	Provide staff development time to development 9-12 framework for instruction and assessment	Training sessions to address needs of ELL students for math skills; use of MN ELL standards
Ensure all teachers are trained to focus on sub domains on the math test; how to address those domains in their content areas	Provide glossary of definitions of each domain criteria, i.e., literal/explicit so that all staff are using the same definitions; provide copies of MN ELL standards for each teacher	Provide ELL strategies for all teachers connected to the sub domains of the MCA II; train teachers to use glossary of definitions in their lesson plans

What parent/family involvement will reflect the performance target?	Who is involved?	When will this be done?	What resources or technical support is needed?
P/FTA will provide at-risk student training for parents and family members in their languages	Consultants Administra-tors Teachers Parents P/FTA members	Beginning 12-05 through 6-06 and beyond	Consultants will provide materials and support
P/FTA will provide information concerning domains to parents with strategies to use at home	Consultants Administra-tors Teachers Parents P/FTA members	Beginning 12-05 through 6-06 and beyond	Consultants will provide materials and support

Develop framework for math accountability for instruction and assessment	Provide time for content teachers to meet with consultants to develop scope and sequences for instruction and assessment for 9th-12 grade; monitor through lesson plans, curriculum mapping and assessment identification and data	Release time to work on content level scop and sequences; teachers are primary stakeholders
Ensure all teachers are trained to use MN ELL math standards and ELL strategies	Provide staff development based on ELL math standards and strategies; implement across the curriculum	ELL strategies across the curriculum
Use formative and summative datea to monitor student progress	Train administrators and teachers to gather, analyze and use formative and summative data to monitor progress of ALL students and NCLB categories	Data training to ensure all teachers know and understand the impact of daily classroom instruction based on MN content standards

Provide information of accountability level of students at P/FTA meetings	Consultants Administrators Teachers P/FTA members	Beginning 12-05 through 6-06 and beyond	Consultants will provide JUMP DISK with all formats; formats will be housed on the site Intranet; administrators and teachers will have access to scope and sequences, lesson plans, mapping documents and assessment protocols
Provide information concerning ELL strategies at P/FTA meetings	Consultants ELL experts Administration Teachers P/FTA members	Beginning second semester through 6-06 and beyond	Consultants and experts will provide materials
Provide simplified training to P/FTA members	Consultants Administration Teachers P/FTA members	Beginning fall 2005; spring 2006; June 2006 and beyond as data is available	Consultants Administration will gather data from MDE website and other data from program outcomes

Performance Target: Subgroup – All students ATTENDANCE and GRADUATION
2004-05 attendance rate of 84% (mostly due to student mobility) is not acceptable.
Attendance rate will improve 2% per year to meet state requirement of 95% by 2010
2004-05 Graduation rate of 18% is not acceptable

Implement Awards/Recognition program as incentive to increase attendance	Involve students as stakeholders in the design and implementation of the program	Provide opportunities for teachers to serve on the program team
Parents will be notified on student absences on a daily basis		Hold staff meeting to ensure all teachers understand and use the attendance program

Use P/FTA to encourage family involvement in the program	Students Teachers Administration Parents P/FTA members	Beginning second semester 06 and continued through each year	None
Notify families of the new policies. Use P/FTA to reinforce policy	Director of Policies Mentors Cultural Advisors Student Representatives Truancy Officer	Beginning December 1, 2005	Software attendance program

Create a conducive environment to enhance cultural awareness	Provide sensitivity training for all staff to know and understand the complexities of the cultures we serve	Cultural awareness through displays, discussions, and presentations
Schedule core classes during first 4 periods to accommodate individual students who need to work	Provide opportunities for students to register to attend morning sessions because of the need to work	Trains staff to supply information and materials for students that need to work – focus on homework issues

Provide opportunities for parents and P/FTA members to participate in cultural awareness activities	Administration Teachers Parents Director of Family and Community Involvement Mentors Cultural Advisors Student representatives	Beginning December 2005 and continuing through out each new school year	None
Provide opportunities for parents to communicate with staff concerning special scheduling	Administrators Teachers Parents Director of Family and Community Involvement Mentors Cultural Advisors Student representatives	Beginning December 2005 and continuing through out each new school year	None

Research base for the strategies listed: Strategies are based first on research of Lincoln International High School data. Staff development needs will be provided through MDE, Minneapolis District, outside consultants and experts. Training will match identified needs based on achievement goals. Other research included SBRR; National Reading Panel; MN Reading First and National Staff Development Standards. ELL strategies are based first on MN ELL Standards and input from ELL experts.

Evaluation: How will you know these strategies work (tie back to your needs assessment)? What strategies have the greatest likelihood of improving the achievement of all students in meeting Minnesota academic standards?

Needs assessment and targets:
MCA outcomes – 2006-2014
Increase in % of scores in Levels 3-5
Decrease in % of scores in Levels 1-2
Increase in % of scores in Level 5 (target – 30% or more)
Decease in % of scores in combined Levels 1-2 (target – less than 10%)
Disaggregate information aligns with state and district data through 2014
Increase in attendance and graduation rates
Decrease in drop-out and mobility rates

Which strategies have greatest likelihood of improving student achievement on Minnesota Standards?
Framing the standards to ensure grade level, content area, school-wide, accountability (Continuum of learning – 4 year plan)

Staff development that addresses the need to align standards to curriculum
Provide site-based assessments in reading, writing, math, and science and compare outcomes with MCAs
Provide opportunities for teachers to work on standards-based lesson plan formats to ensure all student outcome objectives are addressed in the classroom
Monitor textbook connections with MN content standards
Monitor compliance by teachers
Monitor learning by students increase in % of graduates
Monitor increased student and staff attendance

X. COORDINATION AND REALLOCATION OF RESOURCES

Provide evidence of your district's support for this improvement planning including fiduciary required set-asides. Specify the responsibilities of the school and the local educational agency.

APPENDIX F

Bigelow Report - excerpt

Overview of Plaintiffs

The individuals who have brought this case forward have the following characteristics. Their native languages include Oromo[6] (4) and Somali (9). They arrived to the United States between the years of 1999 and 2002. Most of the plaintiffs (8) had been in a refugee camp during many of their school-age years. The range of years in refugee camps among the plaintiffs is from 2 – 8 years. For most (9) of the plaintiffs, their formal schooling began in the United States. Only four of the plaintiffs had had any formal schooling before coming to the United States. Two of the 11 plaintiffs had a 504 plan.[7] The files of plaintiffs Iftu Jibril, Mayamuna Muktar Osman, Ibrahim Mumed, and Fahmo Ahmed suggest a learning disability, but these individuals do not have 504 plans. Scores on the Test of Emerging Academic English

[6] Oromo is a language spoken by Oromos and others in Kenya and Ethiopia.

[7] A 504 plan specifies that no one with a disability can be excluded from participating in federally funded programs or activities, including elementary, secondary or postsecondary schooling. A 504 plan identifies the modifications and accommodations that are needed for the students to have the opportunity to perform at the same level as their peers.

(TEAE)[8] and the Minnesota Student Oral Language Observation Matrix (MN-SOLOM)[9] were available for all but one of the plaintiffs (Shamsa Ali Mohamed). The plaintiffs' scores on these tests show that they were eligible for English language learner services. Currently, 7 of the plaintiffs are still pursuing their education in adult or alternative learning centers. One of the plaintiffs is at the University of Minnesota. Five the plaintiffs are not currently in any educational program.

The plaintiffs fall into the category of English language learners with limited formal schooling (ELL LFS). ELL LFS typically have not had the opportunity to learn to read and write in their native language. It also means that the knowledge and skills they have are much less school-based than their peers of the same age who have not had limited or interrupted formal schooling. Most ELL LFS are victims of political unrest in their nations of origin. Many ELL LFS, like the plaintiffs, are refugees who have been resettled in the United States because they are unable to return to their homelands due to civil war. Adolescent ELL LFS newcomers can face many challenges in the U.S. public school system due to the fact that teachers and programs are unaccustomed to working with students like these. Because they are so unique, it is even more critical for those who educate them to be highly skilled as teachers and counselors

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[8] This is a test of reading and writing for English language learners.

[9] This is a test of speaking and listening skills for English language learners. Neither of these tests are graduation requirements.

and acutely aware of their needs. ELL LFS require carefully designed programs to succeed.

ALHS and the "Lau Guidelines"

In this section, I will discuss ALHS practices in light of the "Lau Guidelines."

(1) Assess the language ability of the student

It is essential for school to assess students' native and second language abilities upon arrival to the school as well as over time. Sound assessment procedures allow for careful placement into appropriately leveled native language and English classes. If the student has a language impairment or disability, it may be possible to gather preliminary information about this at the time of admission. In a recent study of English language learners in California, Williams, Hakuta, Haertel, et al. (2007) found that the more successful schools used assessment data to improve student achievement and instruction and prioritized student achievement using measurable and monitored objectives.

The ALHS literacy and oral assessment used at the time of intake is inappropriate to give to newcomer ELL LFS and does not demonstrate assessment training or expertise. The items are not carefully designed to inform placement into levels because the tests do not include a scoring system that aligns with ALHS courses. There is no indication that any standards were consulted to inform these tests. Some specific critiques I have of the tests are as follows:

- Metalinguistic skills are assessed in section 4: "Grammar and Mechanics."

  Metalinguistic skills (i.e., knowledge about language) are inappropriately highly valued in the ALHS curriculum knowledge and thus show up as inappropriately highly valued on their intake assessment. The skills assessed are school-based *knowledge about language* rather than an opportunity for the student to show what he/she can do with language. The items in this section would be nearly impossible for a newcomer who is ELL LFS to complete. The experience of taking the test is demoralizing and the teacher fails to obtain useful information about what the student *can* do in English.

- Sections 5 and 6 assess the ability to compose a paragraph (in English and the native language) and read extended text for comprehension.

  These sorts of items are inappropriate because an ELL LFS is likely to not be able to carry out any part of this task. Without formal schooling, the student will be unable to read the prompt or answer any of the questions in ways that are asked. The experience of taking this part of the test will also be very demoralizing. A better way of assessment would begin with prompts that students are likely to be able to do and gradually work up to their threshold where they cannot continue.

- ALHS has a student intake form where basic oral language and literacy in English is

> assessed by asking a set of questions, reading short sentences, and reading a paragraph.
>
> Many of these items assess things students would learn in school (e.g., recite the alphabet). The test is not very informative in terms of what the student can do, nor does it reflect more current assessment tasks. For example, the items are not authentic, as they are on typical tests geared toward this type of learner.[10]

ALHS was able to provide test results from the MN-SOLOM and TEAE tests, but there is no other evidence that students' language learning progress is monitored. Furthermore, there is no evidence that there are any criteria offered on what is required to move up in ESL level, out of ESL or on to a different mainstream school. This may be due to the fact that the curriculum at ALHS is very vague and not based on the standards of the field (i.e., TESOL Standards, MN English Language Proficiency Standards).

The Minneapolis Public School English Language Learner Department, in a memo entitled "Annual Review of Exited Students" makes it clear that it is required "to monitor student academic progress for two

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[10] A more authentic reading test would include items such as reading dates on a calendar, reading labels of food and clothing. or identifying common street or commercial signs. A more authentic writing task would include writing a personal note, addressing an envelope, etc. Students with a small amount of schooling could be asked to do some simple school-related tasks such as being asked to "open the book to p. 13," "write their name at the top of the page," "use the index to look up who Abraham Lincoln was."

years following exiting from the ELL program." (Memo dated November 1, 2004). ALHS, however, does not have any mechanism to exit students from their ELL programs. Students would need to transfer to another school on their own accord to gain access to native English speaking peers and mainstream classes.

In a staff survey entitled "Quality Indicators Summary for Lincoln International School" dated November 2, the staff spoke to their perceptions of how assessment is conducted at ALHS.

Table 1. Assessment and Use of Results

	School has no system-wide approach. Some staff may address this area.	School is developing a system-wide approach.*
How school and staff an analyze and use MCAs and other standardized tests to identify areas for improvement in student teaching and learning.	61% (14 staff members)**	26% (6)

How staff use examining student work and other formative assessments to identify areas for improvement in student teaching and learning.	32% (7)	59% (13)
Degree to which classroom assessments evaluate the skills and concepts required by the standards.	19% (4)	57% (12)
Whether the staff uses comparative data to identify strategies for improvement.	68% (15)	23% (5)

*These two categories resent the lowest of 5 possible ratings.
**Total responding - 23

The data presented in Table 1 show that ALHS is only beginning to learn to assess students in ways that inform their instruction. This is of great concern because careful monitoring of ELL LFS is crucial to determining their learning, motivational, and emotional needs, which leads to the next section.

(2) Identify the nature and extent of the students' educational needs

ALHS failed to identify the nature and extent of students' education needs in many areas, but in particular in the area of special education, including gifted and talented.

Documents show, and witnesses confirm that ALHS was operating under a policy stating that newcomers could not be assessed for a disability until they have been in school for three years (see Samb deposition p. 173). This policy does not follow Minnesota Rule.[11]

ALHS did not have any special education assistance for many years and then only had part-time assistance from the district only recently, which accounts for the low numbers of students identified as having receiving special education services (0% in academic years 2002-2003; 2003-2004, 2004-2005) as compared to other schools in the district. This policy is likely the result of most staff in the building being ill-prepared in the field of education and the ALHS leadership's inability to inform themselves properly of readily available policies and procedures.

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[11] See applicable Minnesota Rule:
3525.0750 IDENTIFICATION OF PUPILS WITH DISABILITIES.

School districts shall develop systems designed to identify pupils with disabilities beginning at birth, pupils with disabilities attending public and nonpublic school, and pupils with disabilities who are of school age and are not attending any school.

The district's identification system shall be developed according to the requirement of nondiscrimination and included in the district's total special education system plan.

For example the Minnesota Department of Education offers these guidelines for administrators to monitor the identification of students with special needs.

- If no students who are racial minority group members or limited English proficient have been identified as having disabilities, check to see whether any have been referred. Review information on those students to learn whether there were barriers that prevented their identification as having Special Education needs.
- Remember to use the Nondiscrimination Checklist when reviewing files of minority and LEP students (Minnesota Department of Education. 2003, p. 107).

There are many resources readily available on the internet about the issue of special education among English language learners. For example, the Sevier County School System has a very useful outline for its parents and staff about special education needs among the student body that is learning English (see http://www.slc.sevier.org/esleval.htm) compared to the equivalent for the Minneapolis Public School District which makes no mention of English language learners and special education (see http://schoolchoice.mpls.k12.mn.us/Special_Education.html). ALHS also has no information about education services on its website (see http://www.lincolnihs.org).

It seems, however, that ALHS staff received training on this issue in August of 2003. There is a PowerPoint presentation entitled "Evaluation of English Language Learners for Special Education Utilizing Interpreters While Remaining Compliant." The presenter is not

identified but the presentation contains a great deal of useful information that should have informed ALHS staff about how to deal with identifying and serving students with special needs who are English language learners including information such as the following:

- Lau v. Nichols;
- Federal Law P.L. 94-142;
- Minnesota Rule 35.1354; and
- "10 Steps to compliant evaluations utilizing interpreters."

Given that ALHS staff has a wealth of linguistic resources among its teachers and cultural advisors; it seems that they would have been well-positioned to implement these steps in the school. Nevertheless, the assumption that ALHS staff made was that the only way students could be assessed was in English and that only English oral language and literacy were used to assess special needs students. In her deposition, Nata Samb said "and to me, it makes sense, because *the test* is in English. So you cannot test somebody in a language that the person doesn't know" (Deposition, p. 166). This statement suggests that she believes that there is a single test for special education and that this test is in English. In an email from Samb dated January 12, 2005, she informed ALHS staff of the following: "Unfortunately none of our students can be tested yet for Spec.Ed. ELL or ESL students have to be in school for 3 years in order to be tested for Spec Ed." This confirms the ongoing professional limitations of the ALHS leadership staff described in the MDE report: "When questioned about specific students and general school policies, the ALHS administrator appeared to lack a basic understanding of special education eligibility categories, pre-referral

intervention strategies and the evaluation process" (p. 7). The MDE report suggests that "it is highly probable that ALHS has missed the identification of numerous special education students each of the past three school years" (p. 9).

In Annual School Surveys, teachers confirm that there is a problem meeting the needs of students with special education needs. Their ratings on the question presented in Table 2 are much lower than district ratings:

Table 2. "Percent of staff who agree that the staff at their school are able to adequately meet the needs of students receiving special education services."

ALHS			District
2002-2003	2003-2004	2004-2005	2004-2005
44%	38%	32%	60%

In a letter from Kim Buechel Mesun to Sue Thomas, dated March 18, 2005, the ineffectual policy is restated as such:

> When a teacher has concerns about a student's performance, she may refer a student to one or more of the school's "cultural advisors." Cultural advisors as the term implies, are teachers and other staff at the school who speak the student's language and are familiar with the cultural issues the student may be facing. Issues that are primarily language-related or that are related to ethnic, cultural or economic factors can be identified and addressed at this stage. Students may also be referred to a "student assistance team." A student assistance team

> involves six adults, including teachers and volunteers from colleges with which the school has connections (including Augsburg and the University of Minnesota). The school has a roster of about eighty volunteers available to help out when students have difficulties." (p. 4)

This official statement of their procedure does not include special education specialists, instructional accommodations or any formal evaluation procedure. Volunteers are not qualified to address the often extremely complex special education needs of immigrant youth through tutoring. The fact that a student with special needs is given one-on-one volunteer assistance is no guarantee that they have received services. Nevertheless, this policy seems to still be in place as per Joel Gibson's deposition regarding the role tutoring in addressing special needs (pp. 63 & 69). In her deposition Linda Huntzicker reiterates the role of tutors in addressing learning needs (pp. 46 & 82).

Given these facts, I agree, with the MDE report that ALHS did not follow Minnesota Rule 3525.0750 when it failed to have a system in place designed to identify students with disabilities.

There is no evidence that ALHS has policies in place to assist students when they were struggling to meet graduation requirements. This is required by Minnesota Rule 3501.0110.[12]

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[12] Applicable Minnesota Rule:
3501.0110 OPPORTUNITIES TO LEARN AND REMEDIATION.
A school district's curriculum shall include opportunities for

There is no evidence that ALHS assessed students for being gifted or talented either. This is another type of student need that ALHS is likely to have ignored in its assessment procedures.

(3) Utilize the most effective teaching style to meet those needs

Unfortunately, because ELL LFS struggle at school, they are often given exclusively basic skills classes and repetitive drills instead of activities that will help them build high-level content knowledge, language and comprehension skills (Freeman & Freeman, 2002). Teachers often disregard the knowledge they have and it has been found that with ELL LFS, teachers rarely engage students in modeling and simulation exercises or in cooperative learning, approaches known to be effective with English language learners (Valdés, 2001).

Effective teaching for ELL LFS includes working with curriculum that is thematic and integrated, standards-based and focused on authentic outcomes (Freeman & Freeman, 2002; Hamayan, 1994). The native language is used to ensure that challenging content is comprehensible (e.g., Goldenberg, 1996).[13] Other

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all students to learn the basic requirements. At least two years before the anticipated date of the student's graduation, the district shall develop a plan for remediation for students who have not passed one or more basic requirements tests except for exempt students under part 3501.0090, subpart 1, item A, subitem (3).

[13] In mixed language classes or school settings, it is still possible to leverage the native language for learning by clustering students of the native language together to provide opportunities for

effective strategies include the following characteristics:

- Encourages student involvement;
- Uses visuals that draw on background experience and knowledge;
- Teachers give frequent feedback;
- Content is comprehensible;
- Collaborative interaction is encouraged;
- Language development and content learning are merged;
- Using native language strategically;
- Respect for cultural diversity is shown within and among ethnic groups; and
- School personnel have a strong belief in student potential.

(Gersten & Baker, 2000; Gersten & Jiménez, 1994; Jiménez, 2001, 2003, 2004)

The Minneapolis Public School Guidelines set as their goal that "ELL students are expected to be engaged in and master challenging content and meet the same high expectations established for all students, from kindergarten through grade 12" (p. 105).

Curriculum

ALHS staff have concerns about their curriculum, in relation to the School Improvement Plan (SIP), as the

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cooperative learning in the native language and in order to maximize the bilingual aids in the school. Schools can also offer native language learning materials (e.g., videos, internet, books)

survey results indicate in Table 3. This is of concern because the SIP has required curriculum development.

Table 3. "Percent of classroom teaches who believe there is a direct link between the curriculum taught and the School Improvement Plan."

ALHS			District
2002-2003	2003-2004	2004-2005	2004-2005
86%	56%	44%	80%

In a survey presumably given to teachers or administrators as part of a professional development program (see Program Evaluation Categorized by TESOL Standards, p. 4), the individual rating ALHS answers "no" to the following points:

- Does curriculum reflect best practices for ELLs?
- Is the mainstream curriculum adapted to meet the needs of English language learners?

This same individual answers "partially" to the following questions:

- Do students participate in extra-curricular activities that help promote language acquisition and acculturation?
- Do teachers know how to develop literacy skills with ESL?
- Are the ESL teachers and content area teachers coordinating curriculum?
- Are provisions made for students who cannot graduate from high school before age 21?

In a staff survey entitled "Quality Indicators Summary for Lincoln International School" dated November 2, the staff spoke to their perception of both the Curriculum and the Instruction of Reading and Mathematics at ALHS. These results are presented in the following tables.

Table 4. Curriculum (Reading and Math)

	School has no system-wide approach. Some staff may address this area.	School is developing a system-wide approach*
Alignment of curriculum to state standards and assessments	22% (5 staff members)**	52% (12)
Staff understanding of the research that underlies and supports the school's curriculum	36% (8)	41% (9)
Alignment of curriculum to address diverse learning levels and styles and diverse cultures	27% (6)	36% (8)
Staff understanding of school-wide curriculum, especially of grades just above and below	36% (8)	45% (10)

*These two categories represent the lowest of 5 possible ratings.
**Total responding - 23

Table 4 shows that most of the staff members see serious systemic problems with the Reading and Math curricula or say that these systems are still developing. Given the number of years ALHS has been in operation, this should be of serious concern to the current administration and all supervisory systems of the state of Minnesota.

Table 5 indicates similar ALHS staff concerns in terms of instruction in Reading and Math.

Table 5. Instruction (Reading and Math)

	School has no system-wide approach. Some staff may address this area.	School is developing a system-wide approach.*
How staff identify and develop instructional strategies effective in helping students learn	30% (7 staff members)	35% (8)
How staff vary instructions to address diverse learning levels and styles and diverse cultures	27% (6)	36% (8)

How staff accelerate progress of students who are below grade level	33% (7)	33% (7)
How staff build relationships with students to help them become more actively engaged in learning	5% (1)	45% (10)
How classroom staff and various specialists collaborate to enhance student learning	18% (4)	50% (11)

*These two categories represent the lowest of 5 possible ratings.
**Total responding - 23

The items on this part of the survey are essential to effective instruction for ELL LFS and the data show that most of the staff rate their own performance among the two lowest categories on the 5-point scale.

Another example of how ALHS is unable to meet the needs of ELL LFS through sound instruction is found in the ESL curriculum. The document entitled "Explanation of Levels" lacks any mention of the state or national ESL or content standards. There is no evidence that teachers or administrators know how to create a standards-based curriculum for a given course or across courses/programs.

The English language learning curriculum has two major problems. First it offers too many non-credit bearing electives that are not content based and second, as students advance, they continue to take grammar classes and other stand alone ESL classes that are not content based. The titles on the English Department Textbook list illustrates the lack of content integration in the ESL classes (e.g., Basic English Grammar by Betty Azar is from a traditional and out-of-date series of grammar textbooks, better used for highly educated students).

These are all examples that curriculum developed by ALHS staff is not based on best practices for ELL LFS and that the ALHS staff sees lack of appropriate curriculum development to be a problem. I find Nata Samb's characterization (Deposition, pp. 17-18) of curriculum development leadership at ALHS a partial explanation of why the school's curriculum is not carefully designed:

> "So one thing I did was, "You're the department chair of English, but you have this and this and this to do. Go do it – do it with your teachers," and then I – they report to me. And then I look over it, and I ask teachers based on that curriculum to give me a course outline and lesson plans before school starts. And I remember maybe that was the first time that was done, probably."

This quote shows that Samb expects a curriculum to emerge from her assigning teachers the task of creating one. She also admits that as the academic dean at ALHS, she was the first to ask teachers to create a curriculum. Given the fact that many of the

teachers are novices, I believe they need much more conceptual guidance than Nata Samb is able to offer, as indicated above in her description of curriculum development leadership.

It is unacceptable for K-12 programs that are accountable to state standards to operate without coherent and well-articulated curricula. Without carefully designed curriculum, it is impossible to deliver instruction that meets the needs of ELL LFS.

(4) **Implement the type of educational programs dependent upon the degree of linguistic proficiency of the students in question**

Immersion Program Model

ALHS has advertised itself as a language immersion school. The following quote is from the ALHS mission statement:

> "Lincoln International High School seeks to provide an ethnically diverse English immersion environment of knowledge, recognition, and healing for refugees, immigrants and other disadvantaged students" (Mission Statement, http:www/lincoln ihs.org)

English immersion for this population is not endorsed by professionals in the language education field for a number of reasons. Immersion education is for language majority students (i.e., native English speakers) learning a foreign language (e.g., Spanish, French, Chinese). It is not a program model that is used for language minority children and immigrant

children (for a definition of immersion see Center for Advanced Research on Language Acquisition; Geneses 1987).

More typical program models are termed "ESL", "bilingual", "native language literacy" or "sheltered instruction." Some newcomer programs offer more than one program. For example, if there is a large student population that speaks the same native language (e.g., Somali), the school could offer a bilingual program for newcomers as well as a smaller ESL program for speakers of other languages (Short & Boyson, 2004).

By saying that ALHS follows a language immersion model, the assumption is that students will be in English medium classes where English is used entirely. At ALHS, language immersion may actually mean "submersion" (i.e., sink or swim) or entire lack of services for ELL LFS. It is my opinion that this is not an appropriate program model choice for promoting learning of high school content or for learning English.[14]

By taking the stance of rejecting students' native language as a tool for instruction. ALHS has positioned itself as a school that follows an *assimilationist* philosophy (now outmoded and

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[14] See also Cintron v. Brentwood Union School Dist., 455 F. Supp. 57, 62-63 (E.D.N.Y. 1978). This case found that English "immersion" is not an acceptable program for language minority children to learn English because, students run the risk of not being identified for specialized services or missing important content due to instructional techniques that are not suited to their language proficiency or literacy levels.

replaced by an *acculturationist* philosophy that recognizes students' backgrounds) where the students' native language is seen as a problem rather than a right or a resource (McKay & Wong, 1988a, 1988b). "English only" or "immersion" instruction for ELL LFS is subtractive (Valenzuela, 1999) in that its outcome is likely native language and culture loss resulting in low self-esteem, distancing from parents and grandparents and making the possibility of back migration extremely difficulty. While ALHS seems to favor English over the students' native language(s), the Minneapolis Public School District Guidelines for English language learners lists as its goal to do the following:

> "Bilingual/biliterate students will retain and further develop fluency their first language in order to provide a critical foundation upon which to build second language learning, an important bridge to their community's culture and a distinct employment advantage in a global economy." (p. 105)

Finally, instructionally, many years of research in the area of bilingual education has shown that it is extremely important to leverage the students' native language and culture to aid in understanding new content, and in understanding English. Practically speaking, if educators wait until ELL LFS acquire a high level of English before offering them challenging content and access to the curriculum, students will never have the opportunity before "aging out" or dropping out of school. ALHS has a program that sends the message that students' native language and culture should be left at home because English is the only means of communicating at school.

Isolation of Immigrant Students

Due to their educational/program choices, students from ALHS are isolated from non-immigrant peers in their schooling experiences because of their inability to transition into a mainstream setting.[15] While they are availed of the opportunity to be tutored by a native English speaking peer, this is an uneven relationship. Meaningful opportunities to interact with native English speaking peers would also serve to develop ALHS students' English language skills. ALHS has chosen a program model that does not prepare students for life beyond school, in terms interacting with a diverse society.[16]

Flexible Scheduling

Programs that seek to support the educational goals of older ELL LFS must include flexible schedules for students to work and attend school as well as opportunities for students to take longer than the traditional four years to graduate (Dufresne & Halt, 1997; García, 1999). There is no evidence that this programmatic feature is available for ALHS students.

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[15] I found it surprising that in a document entitled "Institute for New Americans – Draft Master Development Language and dated June 28, 2002, the intention seemed to be to offer a path that would give students full access to the district's educational offerings. The author of the document writes that the plan for this alternative English immersion high school was to "pave the way for these youth to enter a mainstream high school or post-secondary education" (p.2).

[16] This philosophy is contrary to the spirit of landmark cases such as Brown v. The Board of Education and Cintron v. Brentwood Union School District.

Integrated and Credit-Bearing Curriculum versus Stand-Alone ESL

According to the student records and a course listing, the "English Department" (should more appropriately read ESL Department) offers numerous classes. Many of these courses do not count toward any graduation requirement. If ALHS had a more integrated curriculum where students were able to learn language skills through content areas, students would not take so many classes that do not help them accumulate the necessary credits to graduate. It would be more sensible and time-efficient to integrate writing, vocabulary, reading and grammar into content classes where the large ESL staff members collaborate with content teachers to promote joint content and language learning. There is no evidence that ALHS has created systems for collaboration to occur, thus allowing for an integrated, theme-based, and credit bearing educational experiences rather than countless stand-alone ESL courses.

For all of these reasons, ALHS did not implement a program that met the learning needs of the ELL LFS students.

(5) Train bilingual teachers

Because ALHS did not subscribe to bilingual education, they did not hire any teachers with a bilingual license or encourage any of their bilingual teachers to teach bilingually.

(6) Employ school staff qualified to work in a public school

In this section I will discuss the qualifications of the teachers, cultural advisors, and administrators at ALHS. It is my opinion that due to the poor qualifications of the staff, the language and content learning needs of the ELL LFS in the school were not met, therefore creating structural obstacles to gaining access to the full curriculum.

Teachers

Many, if not the majority, of the teachers at Abraham Lincoln High School (ALHS) are not and have not been qualified to teach English language learners with limited or interrupted formal schooling and low levels of print literacy. Qualifications for working with this population minimally include licensure in the subject area of the classes to which the teacher is assigned. Also necessary for effective instruction is participation by all staff in comprehensive in-service professional development programs tailored to the specific needs of ELL LFS and the learning needs of the teachers. Much educational research has shown that teacher quality outweighs other school reform initiatives and that when students are assigned to several ineffective teachers in a row, they have significantly lower achievement than those assigned to highly effective teachers (Darling-Hammond, 1966, 2000). Typical measures of teachers' competence have been academic ability, years of education, years of teaching experience, measure of subject matter and teaching knowledge, certification status and teaching behaviors in the classroom (Darling-Hammond, 2000, p. 6).

There is much evidence that the quality of the teachers at ALHS has been poor since the founding of the school. Even recently and despite efforts to hire more qualified teachers, ALHS when compared to its more reputable peers, does much poorer on a number of measures (see Table 6 below) in terms of key measures of teacher quality.

Table 6. Recent data on teacher quality from MN Dep't. of Ed. 2006 School Report Cards

2006 Report Card Item*	Abraham Lincoln International High School	Wellstone International High School	LEAP
Teachers meeting federal requirements for "Highly Qualified"	72%	100%	93%
Teachers who have a master's degree	0%	99%	72%
Teachers with more than 10 years of experience	0%	68%	39%

Teachers in compliance by licensure	94%	100%	97%
Teachers in compliance by permission	6%	NA	3%

*These are data from the 2006 reports found on http://education.state.mn.us/

Table 6 shows that ALHS teachers lag behind in meeting federal requirements for being "Highly Qualified", level of education, amount of teaching experience, and teaching within their area of licensure, if fully licensed at all.

These problems are not new. In an email from Mary Barrie to ALHS staff dated November 4, 2002, the issue of licensure comes up. She says that 17 of 26 ALHS staff "cannot be teaching" due to the fact that they are not licensed and "don't even have a file folder number."

Appendix A of ALHS' 2005 annual report offers the following information about teacher qualifications:

- None of the current teachers have an ESL license (except Fanta Toure-Diaby who had a "commissioner exemption" to teach ESL). While not required, it is nevertheless very problematic for school made up almost entirely of English language learners to have content teachers without formal preparation

in working with English language learners because in order to follow best practices, content teachers must use ESL pedagogy to teach language through their content areas.

- There were 3 licensed teachers in Mathematics and 3 licensed teachers in Social Studies. However, among the Science teachers, there seems to have been licensure among the staff in Life Sciences and Physical Sciences. What I see missing is the teaching expertise to offer the full range of Science classes, which would also include Earth Science. This implies that the school either does not offer a full Science curriculum or teachers are teaching outside of their licensure areas.
- There was only one Communications Arts/Literature teacher, which suggests that ESL teachers were teaching Language Arts. This is a concern because an ESL license does not qualify a teacher to teach Language Arts and would be teaching outside of their licensure area of the ESL class counted as a straight English/Language Arts class.
- The fact that there were 5 ESL teachers[17] would suggest that there would be staff resources for collaborating with content teachers to offer opportunities both for content teachers to integrate language learning aims into their classes as well as for students to learn English through meaningful, engaging content. However, the

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[17] Maimouna Diallo's Commissioner Exemption expired in 2006 so she is not qualified to have an ESL class in a public school.

> choice ALHS has made is to offer many ESL classes that are not theme based or tied to a content area. This is likely due to lack of administrative leadership, teacher training and teachers licensed in a content area and ESL.

ALHS has been frequently in violation of Minnesota Board of Teaching regulations with regard to licensure. This fact implies that students at ALHS are not being taught by qualified teachers.

Cultural Advisors

ALHS employed "Cultural Advisors" to assist students in their academic and emotional transition to school in the U.S. They also helped serve as liaisons between school and students' families. This is extremely important work given the psychological and emotional needs of refugee students. Refugees have likely experienced loss and trauma (Delgado, Jones, & Rohani, 2005; Rutter, 2003). These are complex needs that require the most talented and qualified counselors.

There is no evidence that the Cultural Advisors at ALHS had any qualifications to do the work they were assigned to do. The Minnesota Department of Education requires a license in school counseling for doing the sort of work Cultural Advisors were presumably doing without any professional preparation (e.g., managing conflict, counseling in personal and academic matters). Given that the majority of the Cultural Advisors were likely to be unfamiliar with U.S. schooling practices and requirements, it is of much concern that they were

charged with the responsibility of advising students in a public school. Also of concern is the apparent belief that being of the same ethnicity as some or many of the immigrant students qualifies a person to help students navigate the often extremely complex nature of high school graduation requirements, opportunities beyond high school and the often urgent psychological needs of newcomers and, their families.

There is much research showing that schools and teachers can be an essential source of social (Coleman, 1990, p. 101) and cultural capital (Bourdieu & Passeron, 1977). And while immigrant families and ethnic communities are often a rich and powerful source of social capital (Bigelow, in press), many students rely greatly on their teachers and counselors to provide them with important information about life outside the school walls such as career and work opportunities (Furstenberg & Hughes, 1995; Stanton-Salazar, 1997, 2001; Stanton-Salazar & Dornbusch, 1995). There is no evidence in the documents of the case that the teachers and counselors were qualified to do this challenging work of both orienting students to U.S. schooling expectations and exposing them to the wide range of vocational and academic opportunities that are available when they reach the age of 22.

Finally, the administrators at ALHS have not always held administrative licenses, as they should, nor been educated in or familiar with the academic needs of ELL LFS. Licensure among the ALHS administrators was of concern to the board and Joel Gibson but they were unable to hire licensed principals until recently. It has been shown that school leadership plays an essential role in student learning (Leithwood, Seashore Louis, Anderson, & Wahlstrom, 2004). This is because

strong leaders are capable of "setting directions", "developing people", and "redesigning the organization" (pp. 8-9). For ELL LFS to succeed it is critical for school administrators to provide them with appropriate programs and be knowledgeable about recent research and educational practices on this population (Hamilton & Moore, 2004; Walsh, 1991).

There is much evidence of the inability of the administrators to provide leadership for ALHS as well as their lack of qualifications. The following are some examples:

- When teachers were surveyed, they indicate a high level of dissatisfaction about how decisions are made at the school:

Table 7. "Percent of staff who are satisfied overall with the way that decisions are made at this school."

ALHS			District
2002-2003	2003-2004	2004-2005	2004-2005
67%	67%	56%	70%

- In April of 2005, Mr. Aly Xiong was evaluated by the ALHS staff. The staff rated Mr. Aly very low on most items. An email from b.nygren@att.net (ALHS Board Member) to Joel Gibson said "Mr. Aly has the dilemma of not having any real support of staff in any of the areas surveyed/assessed." Other e-mails lay out the difficulty Joel Gibson and the board had in urging him to obtain his administrative license. Despite his never obtaining his license, ALHS retained him for the entire

academic year. One teacher noted that the school had "no support from administration" for years (p. 5, #9 of teacher comments on Mr. Xiong's review).

- Sokhna Nata Samb was an Academic Advisor (responsible for students' schedules) and then the Academic Dean (responsible for curriculum) of ALHS. Her educational background does not suggest that she was qualified for either of these roles. Her first role would suggest the need for a school counseling degree and the second role would suggest a degree in curriculum and instruction, not educational policy and administration, which deals more with leadership issues and broader policy issues in the field of education.

- Joel Gibson (ALHS Director, Board Member, Consultant) shows a lack of knowledge of public education in a number of cases. For example, he believes alternative schools are for "at risk" students. This is incorrect – alternative schools simply follow a particular curricular or educational philosophy. He speaks in his deposition about special education being provided by the district (p. 40). This is an unusual comment because special education professionals typically assist in student assessment and developing Individual Educational Plans, but *teachers* are the ones who must implement accommodations. He also seems to have accepted that "there was a policy" about students having a minimum number of years

in school before being referred to special education evaluations (pp. 60-61).

- Administrators Samb, Gibson and Huntzicker define "English immersion" in a number of inaccurate and inarticulate ways.[18] For instance, as per their depositions, the following shows how they characterize the philosophy of their program:

    - "Formally speaking, English -- English immersion means that the class -- that the educational experience is conducted solely in the English language and that the student is fully immersed in all of -- all of their educational processes through the English language." (Gibson, p. 85)
    - "To me, it means like, okay, we have a student who has not had English. English is a second language. So the student goes to a school, sometimes they have a little bit of English or zero English. They need to learn the basics of English. They need to be immersed in the --- into the language in the classroom. They need to know more about the culture, more about what needs to be done in academics. That's how I understand it, like immersion in all core curriculum." (Samb. p. 19)

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[18] M. Wadi in his deposition simply says that their approach for the newcomers is immersion, without attempting to define it (p. 28).

- "English immersion is the same as second language immersion, is the same as bilingual." "That the classes are taught in English and are structured on levels, is the way I interpret that to mean. That it's – it's a curriculum delivered in English." (Huntzicker, p. 26, p. 49)

These quotes suggest that they simply believe that teaching students in English is best practice. They are unable to offer a rationale grounded in the educational literature.

It is my assessment that the ALHS staff were not prepared to be charged with the education of the immigrant youth at their school.

(7) Offer staff in-service professional development opportunities geared toward their student population

While the staff at ALHS did not have the academic qualifications to be working in a public school for immigrant adolescents, there is much evidence that that they also did not receive the professional development that they needed to learn about their population of ELL LFS and reform their educational programs and procedures accordingly.

For professional development to have an impact it must be sustained (Darling-Hammond & McLaughlin, 1995). Olsen and Jaramillo (1999) argue that sustained professional development for *all school staff* must involve collaboration and individual reflection due to the complex structural barriers for immigrant

youth. Teachers working with ELL-LFS need many kinds of support to build students' self-confidence and academic skills. For example, they need particularized and specialized training in curriculum development, opportunities to visit successful programs, opportunities to develop thoughtful policies and networking opportunities with other teachers who work with the same population (Paiewonsky, 1997).

There is little evidence that ALHS ever engaged its staff in sustained professional development. This is typically a leadership responsibility which at ALHS should have been jointly shared by the academic director and the director or principal. The No Child Left Behind Act is clear about what should be offered to teachers in terms of professional development. The following list outlines the basic features of sound professional development:

1. All activities are referenced to student learning;
2. Schools use data to make decisions about the content and type of activities that constitute professional development;
3. Professional development activities are based on research-validated practices;
4. Subject matter master for all teaches is a top priority;
5. There is a long-term plan that provides focused and ongoing professional development with time well allocated;
6. Professional development activities match the content that is being instructed;
7. All professional development activities are fully evaluated; and
8. Professional development is aligned with state standards, assessment and the local school

> curriculum. (U.S. Department of Education, 2002)

Former director Joel Gibson recognizes that not all of the Minneapolis Public School district training was relevant to the specific needs of their students (Deposition, p. 80) I am pleased that under Linda Huntzicker's leadership they began Sheltered Instruction Observation Protocol (SIOP)[19] training through the district; however, ALHS staff should have received training such as this much earlier. SIOP training has been available for many years. The skills emphasized in SIOP are the sorts of skills ALHS teachers should be expert in, given their ELL LFS immigrant/refugee student body. There is an outline entitled "All Staff Training/Staff Development" which lists a series of workshops and presentations that are on a range of topics and which are not necessarily interconnected. There is no evidence that teachers were called upon to reflect about the implications of what was presented and much less act upon anything presented in this series of workshops. There was little professional development tailored to the staff's needs before the lawsuit, and there is still little support for professional development now.

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[19] SIOP is a set of instructional strategies used by classroom content teachers (e.g., Social Studies, Mathematics, Science) to make their content more accessible to English language learners. "Accomplished sheltered instruction teachers modulate the level of English used with and among students and made the content comprehensible through techniques such as the use of visual aids, modeling, demonstrations, graphic organizers, vocabulary previews, predictions, adapted texts, cooperative learning, peer tutoring, multicultural content and native language support" (Echevarria & Short, n. d., pp. 8-9).

It is of great concern that there is no evidence ALHS had engaged its staff in sustained and relevant professional development before this. There is no evidence that ALHS staff engaged in any professional development that would reflect the NCLB standards.

When surveyed, ALHS confirm a serious lack of staff development opportunities:

Table 8. "Staff members who report they have often or frequently received meaningful feedback on their performance from colleagues."

ALHS			District
2002-2003	2003-2004	2004-2005	2004-2005
38%	25%	33%	57%

Table 9. "Percent of staff who agree that staff development opportunities approved by the district provide effective instructional strategies to teach a diverse student body."

ALHS			District
2002-2003	2003-2004	2004-2005	2004-2005
88%	67%	39%	62%

Another document entitled "Quality Indicators Summary for Lincoln International School" offers the following additional information about staff development:

Table 10. Staff Development

	School has no system-wide approach. Some staff may address this area.	School is developing a system-wide approach.*
How the school selects content for staff development relevant to improving student learning	22% (5 staff members)**	39% (9)
How the school creates a culture for learning among the staff	17% (4)	43% (10)
How the school leadership supports an environment for staff development	17% (4)	43% (10)

*These two categories represent the lowest of 5 possible ratings.
**Total responding - 23

The lack of quality and quantity of professional development opportunities may not be surprising given the apparent belief at ALHS that formal preparation in administration, teaching, or counseling is not necessary for doing the work of educating ELL LFS. The large corpus of professional knowledge available to educators about ELL LFS seems to have been largely disregarded by the school.

Conclusions

Returning to the list of best practices in serving the educational needs of ELL LFS, I will briefly discuss my conclusion regarding the practices found at ALHS using the list of best practices set out at the beginning of this report:

Content instruction is offered in the students' native language, or bilingually, when there is a large population and teachers available. ALHS underused its bilingual staff in this regard in fact, it is unclear why bilingual staff were hired if they were unable to instruct in the native languages of the students or aid in the assessment of students' special instructional needs. If students had been permitted to learn content in their native language(s) upon arrival, they would have been able to earn more credits toward graduation. The use of the students' native language(s) also helps students feel that they are welcome at school and able to communicate and learn using all of the linguistic resources at their disposal. Lack of teacher preparation and in-service teacher development are likely to have contributed to these decisions.

A strong content-based literacy curriculum. It seems that ALHS has fallen into what is widely regarded as poor instruction for older learners becoming literate for the first time. The ESL elective curriculum seems to focus solely on developing decoding skills in English while disregarding the fact that older learners need to engage in meaningful interaction with a range of texts and can often benefit from basic literacy instruction in their native language(s) to learn

simple print concepts. Lack of teacher preparation and in-service teacher development are likely to have contributed to a program that has these features.

- Emphasis on developing academic language. ALHS students were not given access to content in their ESL classes or through bilingual classes, therefore limiting their ability to develop the academic language skills needed to graduate from high school. This is the result of a poorly conceived program and the lack of structural support for ESL and content teachers to collaborate around the joint need students have to learn English and content material.
- Thorough intake assessment. Given the noted confusion among ALHS students and their families in the documents about "aging out" and number of credits needed to graduate, it is clear that ALHS was not successfully communicating its policies, or if they had policies in either regard. The examples of the language assessments used by ALHS would not indicate that they were informed by best practices in language instruction or that they would be particularly helpful in placing students into the leveled ESL program. Assessments included in the students' files also offer little information that would be useful in informing instructional practices either.
- Clear promotion and exit criteria. There were not clear assessment procedures to identify an individualized and strategic plan for students to tackle high school requirements. There were no clear criteria for promotion out of the "Immersion Program" or up through the ESL levels. The ALHS program is fundamentally flawed because, as a separate-site program, ALHS did not have any exit

criteria. Students do not exit their program unless they graduate, drop out, age out or transfer to another school. I was unable to find any exit forms or forms monitoring student who are transitioning into mainstream classes in the materials. ALHS did not have a close collaboration with anther high school in the district to afford students the opportunity to move into an entirely mainstream learning environment.

- Meaningful interactions with English speaking peers. It seems that the only opportunity for ALHS students to interact with English-speaking peers position of getting peer tutored.
- Program evaluation. ALHS shows no evidence of evaluating its programs internally for how well they succeed with their student body. Part of program evaluation would involve following students who leave their program.

I have found much evidence that the ALHS failed to overcome students' English language learning needs to allow them to participate in the educational program offered by the school district. They failed in multiple and intersecting ways as they chose program models, assessment tools/procedures and instructional approaches that were not well suited to their unique student population. Unprepared and unsupported teachers, counselors and aids were left under the guidance of unprepared administrators. Immigrant students at ALHS deserved much more. Their need for an education was crucial and now they are left, again, after already having their education delayed or interrupted, to make up for lost time on their own. It should not have been this way for our newest Minnesotans.

(4)

No. 10-703

Supreme Court, U.S.
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In the Supreme Court of the United States

IBRAHIM MUMID, ET AL.,
Petitioners,

v.

ABRAHAM LINCOLN HIGH SCHOOL, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. The Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701, *et seq.*, contains a comprehensive formulation of remedies that was intended to "correct" individual violations of its terms. 20 U.S.C. §§ 1712-1718. The remedies do not include a recovery of monetary damages. The narrow question of law presented is whether, contrary to the express language of these remedial provisions, and previous decisions of this Court, Petitioners have standing to maintain a suit for damages against a school district that allegedly violated 20 U.S.C. § 1703(f).

II. The lower courts never reached the merits of Petitioners' claims under the Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701, *et seq.* Instead, the lower courts concluded that Petitioners lacked standing to pursue those claims in light of the courts' inability to award them the specific remedies that they had requested. *See* Petition Appendix 15a-19a (United States Court of Appeals for the Eighth Circuit) and 43a-50a (United States District Court for the District of Minnesota). Therefore, this case presents the question of whether, despite the fact that the lower courts did not pass upon this issue, the Court has sufficient cause to consider whether plaintiffs are required to demonstrate discriminatory intent in claims brought under the Equal Educational Opportunities Act of 1974.

III. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, prohibits entities that receive federal funds from intentionally discriminating against

individuals on the basis of, *inter alia*, their national origin. *See, e.g., Alexander v. Choate*, 469 U.S. 287, 293 (1985). The narrow question of law presented is whether, contrary to this Court's ample guidance, Petitioners can establish the existence of a discriminatory intent by demonstrating that a school district's policies had a disparate impact on foreign-born students.

RULE 29.6 DISCLOSURE STATEMENT

Respondent Special School District Number 1, Minneapolis Public Schools, is a political subdivision of the State of Minnesota.

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STATEMENT OF THE CASE

Petitioners are thirteen former students of the former Abraham Lincoln High School ("ALHS"). Each of the Petitioners arrived in the United States as teenagers with little or no formal education and with limited or no knowledge of the English language. ALHS served newly arrived immigrant high school students and was operated by Respondent Institute for New Americans. Respondent Special School District No. 1, Minneapolis Public Schools ("District") first contracted with the Metropolitan Federation of Alternative Schools and then the Institute for New Americans to provide educational services to students who choose to attend ALHS and were eligible under Minnesota's Graduation Incentives Act. The District did not assign Petitioners to, or otherwise require Petitioners to enroll in, ALHS. Rather, Petitioners admittedly enrolled in ALHS on their own accord.

In 2005, some (but not all) Petitioners filed a complaint with the Minnesota Department of Education ("MDE"). Pet. App. 63a, *et seq.* The MDE complaint alleged that the District violated the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* ("IDEA"), federal regulations promulgated by the United States Department of Education pursuant to the IDEA, and Minnesota special education laws and regulations by failing "to develop a system designed to identify pupils with disabilities at the ALHS." Pet. App. 64a. During the MDE's investigation into the complaint, the District reported that most students at ALHS are English Language Learners ("ELL") and "many students are at a very beginning level of English language learning." Pet. App. 73a. The District asserted that, under

applicable special education laws, it had to rule out students' lack of English language proficiency as a cause of academic difficulties before it could determine whether a student qualified for special education services. Pet. App. 74a.

The MDE ultimately concluded that, "[i]n general, the District did not evaluate ELL students until they have been in ELL for three years. This practice seemed to be tied to the District stance that it must first rule out lack of previous instruction and limited English proficiency before a student could be evaluated." Pet. App. 85a. The MDE ultimately concluded that the District's (unwritten) special education testing practice violated the IDEA regulations and their State law counterparts. Pet. App. 89a. The MDE ordered the District to take corrective action to ameliorate these violations. Pet. App. 90a-93a. The District promptly took all actions ordered by the MDE and, on April 4, 2007, the MDE issued a letter stating that the District had discharged its obligations imposed by the complaint decision. App. 1b-2b.

Not satisfied with the educational progress they had made during their limited time at ALHS, Petitioners brought suit in the United States District Court for the District of Minnesota ("District Court"), asserting claims against the District under the Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701, *et seq.* ("EEOA"); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d ("Title VI"); and the Minnesota Human Rights Act. Each of Petitioners' claims questioned the quality of the education and services they received at ALHS. Specifically, Petitioners' EEOA claim alleged that the District had

violated 20 U.S.C. § 1703(f) by failing to take "appropriate action to overcome language barriers" which Petitioners faced. Petitioners' Title VI claims and claims under the Minnesota Human Rights Act alleged that Respondents, including the District, had discriminated against Petitioners on the basis of their national origin by refusing to administer special education eligibility tests until the students had been enrolled at ALHS for three years.[1] Petitioners' Complaint requested injunctive relief and monetary damages.

On July 16, 2008, the District Court granted Respondents' motions for summary judgment in their entirety and dismissed Petitioners' claims with prejudice. Pet. App. 51a. The District Court found that the Petitioners lacked standing to pursue their claims under the EEOA because their "injuries are not redressable [under the EEOA]." Pet. App. 43a (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) for the proposition that "[r]edressability is an element of standing").

Specifically, the District Court concluded that Petitioners could not receive prospective injunctive relief because "no plaintiff will ever again attend

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[1] Petitioners also asserted that, in general, they had received a poor education at ALHS. *See, generally*, Pet. App. 28a-31a. To the contrary, the District introduced evidence that: ALHS staff were qualified and dedicated; the curriculum was sound; the practices at ALHS were reasonable and appropriate; and that most students at ALHS made reasonable progress." App. 5b; *see also* Pet. App. 43a (recognizing the "force" of the District's factual arguments).

[ALHS]." Pet. App. 44a.[2] Turning to Petitioners' request for money damages, the court determined that the EEOA does not provide for money damages and, therefore, the court lacked power to grant the relief sought by Petitioners. Pet. App. 50a. The court's conclusion was based on its interpretation of the provisions of the EEOA that specifically address remedies. Pet. App. 46a-50a.

The District Court dismissed Petitioners claims under Title VI for two reasons. First, the court concluded that eleven of the thirteen Petitioners had not demonstrated that they suffered any harm as a result of the District's application of its special education testing policy. While Petitioners continue to assert that they suffered "a variety of harm based on their national origin," *see* Pet. at 7, they have yet to provide any evidence that they would have been found eligible for special education services if they had been tested. *See* Pet. App. 9a. Second, the court determined that the District offered a "legitimate, nondiscriminatory explanation for its [special education testing] policy and plaintiffs have no evidence from which a jury could conclude that the explanation is pretextual." Pet. App. 39a.

After the District Court denied Petitioners' request to file a motion for reconsideration, Petitioners appealed the District Court's decision to the United States Court of Appeals for the Eighth Circuit ("Eighth

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[2] While recognizing the basis for the District Court's decision, *see* Pet. at 8, Petitioners mistakenly assert that the District Court determined that their claims were moot. Pet. at 13. While the District did raise the issue of mootness to the District Court, the court did not reach that question in issuing its decision.

Circuit") on July 23, 2008. For the first time on appeal, Petitioners argued that the District's special education testing policy was "facially discriminatory" and, therefore, the District Court erred by requiring them to demonstrate discriminatory intent under the framework established by the Court's *McDonnell Douglas Corp. v. Green*,411 U.S. 792, 802-04 (1973) decision. Pet. App. 9a; *see also* Pet. at 8-9 (identifying Petitioners' arguments to the District Court and the Eighth Circuit). Also on appeal, Petitioners reiterated their position that they were entitled to recover money damages for an alleged violation of the EEOA.[3] The Eighth Circuit rejected both arguments and affirmed the District Court's opinion in its entirety. Pet. App. 19a. This Petition followed.

REASONS FOR DENYING THE PETITION

I. THE EIGHTH CIRCUIT'S INTERPRETATION OF THE EEOA IS CONSISTENT WITH THE COURT'S DAMAGES JURISPRUDENCE, INCLUDING THE COURT'S *FRANKLIN V. GWINNETT COUNTY PUBLIC SCHOOLS* DECISION

As Petitioners assert, the question of whether damages are available as a remedy in a suit brought under the EEOA is a matter of first impression. Petition at 10. More specifically, it is a matter of first impression among the Circuit Courts of Appeal. The United States District Court for the Southern District

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[3] Petitioners did not appeal the District Court's determination that they lacked standing to receive injunctive relief under the EEOA.

of Ohio has previously addressed this issue. *See Pethel v. Dennison*, 2008 WL 859034 (S.D. Ohio 2008) (unpublished). Like the Eighth Circuit, the *Pethel* court also concluded that the EEOA does not "provide for the award of general damages" sought by the plaintiff in that case. *Id.* at * 6.

While the availability of money damages in a suit brought under the *EEOA* is a matter of first impression, this Court has previously provided a comprehensive framework for determining whether any given statute permits an award of damages. *See, e.g., Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 65-70 (1992). Thus, despite being a matter of first impression, the question of whether damages are available under the EEOA is hardly novel and does not need to be settled by the Court.

Moreover, in reaching its decision that damages are not available under the EEOA, the Eighth Circuit correctly applied this Court's jurisprudence regarding the availability of monetary damages to the text of the EEOA. Despite Petitioners' assertions to the contrary, there is no conflict between the lower courts' decisions in this matter and the *Franklin* decision.

In its *Franklin* decision, this Court recognized that it "presume[s] the availability of all appropriate remedies *unless Congress has expressly indicated otherwise*." 503 U.S. at 66 (internal citation omitted) (emphasis added). From this statement alone, Petitioners extrapolate that damages are available under the EEOA. *See* Pet. at 10-13. Petitioners' argument wholly ignores the *Franklin* Court's analysis of the availability of a damages remedy. The Eighth

Circuit properly rejected Petitioners' shallow interpretation of the *Franklin* case.

The *Franklin* case involved claims brought pursuant to Title IX of the Education Amendments of 1972 ("Title IX"). 503 U.S. at 62-63. As the Court recognized, there is an "implied right of action under Title IX." *Id.* The only question before the Court was "what remedies are available in a suit brought pursuant to this implied right." *Id.* at 66.

In determining that damages are available under Title IX, the Court interpreted the "long line of cases in which the Court has held that if a right of action exists to enforce a federal right *and* Congress is *silent on the question of remedies*, a federal court may order any appropriate relief." *Franklin*, 503 U.S. at 69 (emphasis added) (internal citations omitted). From its examination of those cases, the Court recognized the "general rule that all appropriate relief is available in an action brought to vindicate a federal right *when Congress has given no indication of its purpose with respect to remedies*." *Id.* at 68 (emphasis added) (internal citation omitted).

Unlike the "implied right of action under Title IX," Congress has specifically identified the remedies available to a plaintiff claiming a violation of the EEOA. *See* 20 U.S.C. §§ 1712 – 1718 ("Part 4 – Remedies"). In fact, as Representative Marvin Esch commented in introducing the EEOA to the House of Representatives, the EEOA was intended to "define... both denials of equal educational opportunities *and remedies available to overcome such denials*." Pet. App. 12a-13a (quoting 120 Cong. Rec. 8265 (1974)) (emphasis added). This purpose was codified at 20

U.S.C. §§ 1701(b) and 1702(b). Congress was not "silent on the question of remedies" when it drafted the EEOA. In fact, this Court has previously recognized that, in drafting the EEOA, Congress "simply legislated revised evidentiary standards *and remedial priorities to be employed by courts* in deciding such cases [against school districts or school boards]." *Monell v. Dep't of Social Servs. of City of New York*, 436 U.S. 658, 699 n.63 (1978) (emphasis added). Since Congress expressly provided remedies for violations of the EEOA, which do not include money damages, courts cannot presume that the legislature intended to make money damages available as a remedy. *See Franklin*, 503 U.S. at 66, 69. Similarly, the *Franklin* Court recognized the *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) decision as an example of a case in which it "rejected a claim for damages under a statute that expressly enumerated the remedies available to plaintiffs." *Franklin*, 503 U.S. at 69, n6.

Moreover, the EEOA contains detailed provisions regarding remedies. One section of the EEOA expressly limits courts to awarding "such remedies as are *essential to correct particular denials* of equal educational opportunity or equal protection of the laws." 20 U.S.C. § 1712 (emphasis added). A more specific provision of the EEOA mandates that:

> In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, which may involve directly or indirectly the transportation of students, a court, department, or agency of the United States shall consider and make specific findings on the efficacy in correcting such denial

of the following remedies and shall require implementation of the first of the remedies set out below, or of the first combination thereof which would remedy such denial:

(a) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account school capacities and natural physical barriers;

(b) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account only school capacities;

(c) permitting students to transfer from a school in which a majority of the students are of their race, color, or national origin to a school in which a minority of the students are of their race, color, or national origin;

(d) the creation or revision of attendance zones or grade structures without requiring transportation beyond that described in section 1714 of this title;

(e) the construction of new schools or the closing of inferior schools;

(f) the construction or establishment of magnet schools; or

> (g) the development and implementation of any other plan which is educationally sound and administratively feasible, subject to the provisions of sections 1714 and 1715 of this title.

20 U.S.C. § 1713. Nothing in this provision authorizes the award of money damages. As this Court has recognized, "[w]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Russell*, 473 U.S. at 147 (internal citation and quotation marks omitted). The Eighth Circuit held to this well-settled principle by declining to read the EEOA as including a remedy for money damages in light of its detailed remedial scheme. *See* Pet. App. at 16a-19a.

The Eighth Circuit's decision that the EEOA does not permit an award of money damages is also firmly grounded in the doctrines of statutory interpretation developed by this Court. The Eighth Circuit's routine application of these doctrines warrants no further review from the Court.

It is a "well-established principle that, in most contexts, a precisely drawn detailed statute pre-empts more general remedies." *Hinck v. United States*, 127 S.Ct. 2011, 2015 (2007) (internal citation and quotation marks omitted); *see also D. Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932) (recognizing that specific provisions of a statute take precedence more general provisions of the same statute) (internal citations omitted), *Bloate v. United States*, 130 S.Ct. 1345, 1354 (2010) (same), *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 525 (1989) (same). The EEOA contains specific provisions addressing

available remedies. *See, generally,* 20 U.S.C. §§ 1712-1718. In fact, the EEOA contains a "precisely drawn" list of available remedies in order of priority. 20 U.S.C. § 1713. Therefore, the EEOA has preempted "more general remedies." *See Hinck*, 127 S.Ct. at 2015.

Moreover, as the Eighth Circuit recognized, the remedies available under the EEOA are limited to those that are "essential *to correct*" violations of the EEOA. Pet. App. 17a (quoting 20 U.S.C. § 1712) (emphasis in original). Courts award money damages to compensate a plaintiff for past wrongs, not "correct" any legal deficiency. *See* Pet. App. 17a. Therefore, even assuming *arguendo* that Congress did not intend to limit the EEOA remedies to those included in Section 1713, Section 1712 expressly precludes an award of money damages for violations of the EEOA.

Finally, it is a "fundamental cannon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). The Eighth Circuit applied this doctrine, *see* Pet. App. 16a (citing *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)), and concluded that the "language and structure of the EEOA indicate that the congressional purpose was to provide only equitable remedies for a violation of the statutory rights created by the statute." Pet. App. 17a.

The Eighth Circuit properly applied this Court's jurisprudence, including the *Franklin* decision, to determine that the EEOA does not authorize Petitioners to recover money damages. No further

review of this routine application of precedent would clarify any important question of federal law. Nor would further review resolve any conflict between the Eighth Circuit's decision and any decision of this Court, or any other court.

II. THE LOWER COURTS DID NOT DETERMINE THAT PETITIONERS WERE REQUIRED TO DEMONSTRATE DISCRIMINATORY INTENT IN ORDER TO MAINTAIN THEIR CLAIMS UNDER THE EEOA

Petitioners assert that the Eighth Circuit's decision conflicts with the Fifth Circuit case of *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981). Pet. at 14-15, 18-19. Petitioners' argument is based on their belief that the Eighth Circuit concluded that they were required to demonstrate discriminatory intent in order to maintain their claim that the District violated the EEOA. *See* Pet. at 14-15.

Petitioners' perception of the Eighth Circuit's decision differs sharply with the reality of the lower courts' opinions in this matter. Neither the Eighth Circuit nor the District Court ever reached the question of whether a plaintiff needs to demonstrate discriminatory intent to assert a claim under the EEOA. Instead, the District Court concluded that Petitioners lacked standing to pursue their claims under the EEOA "because no remedy was available under the statute to redress their alleged injury." Pet. App. 11a (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 106 n.7, 129 & n.20 (1983) (Eighth Circuit); *see also* Pet. App. 43a (District Court). The Eighth Circuit agreed, finding neither injunctive relief nor monetary

damages were available to these plaintiffs. Pet. App. 12a.

This Court has recognized that it is "one of final review, not of first view." *F.C.C. v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1819 (2009) (quoting *Cuter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). Indeed, the Court ordinarily does not decide in the first instance issues not decided below. *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 931 n.2 (2010); *see also Cutter, supra.*, *F. Hoffman-La Roche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 175 (2004), *Michigan v. Lucas*, 500 U.S. 145, 150 (1991), and *United States v. Sperry Corp.*, 493 U.S. 52, 66 (1989). There is no reason why the Court should deviate from its usual practice in this matter.

Just last year, the Court considered the EEOA as it applies to ELL students, such as Petitioners. *See, generally, Horne v. Flores*, 129 S.Ct. 2579 (2009). In its *Horne* decision, the Court examined Section 1703(f), the very provision that forms the basis for Petitioners' claims in this matter. *Id.* at 2597. While the Court did not discuss intentional discrimination, the Court did note that the EEOA "leaves state and local educational authorities a substantial amount of latitude in choosing how this obligation [to take appropriate action to overcome language barriers] is met." *Id.* at 2597 (quoting *Castaneda*, 648 F.2d at 1009). As this Court has so recently provided guidance as to the interpretation of the EEOA, it is difficult to see why it should be called upon in this matter to

address a closely related point of law that neither lower court addressed in this matter.[4]

III. THE EIGHTH CIRCUIT'S INTERPRETATION OF TITLE VI DOES NOT WARRANT FURTHER REVIEW

Petitioners assert that the Eighth Circuit deviated from this Court's precedent by ruling that Petitioners were required to demonstrate discriminatory intent in order to maintain their claims under Title VI. *See, generally,* Pet. at 14-17. Petitioners' argument overlooks a significant provision in that holding and misinterprets this Court's past decisions. Despite Petitioners' obvious disagreement with the Eighth Circuit's decision, there is no conflict between its ruling and any decision of this Court.

A. Review of the Eighth Circuit's Interpretation of Title VI is Unnecessary in Light of the Eighth Circuit's Determination that Petitioners waived their *Johnson Controls* Argument by Failing to Raise it in the District Court

For the first time on appeal to the Eighth Circuit, Petitioners alleged that the District's policies regarding special education testing for students attending ALHS were facially discriminatory and, therefore, they did not need to demonstrate discriminatory intent to maintain their claims under Title VI. *See* Pet. at 9 (citing *UAW v. Johnson*

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[4] The District has never argued that Petitioners were required to demonstrate discriminatory intent under the EEOA.

Controls, 499 U.S. 187 (1991)); *see also* Pet. App. 9a. The Eighth Circuit noted that Petitioners had neither raised their facially discriminatory argument, nor cited *Johnson Controls*, in their "extensive" briefing to the District Court. Therefore, the Eighth Circuit held that it was "hard pressed t see why [this] contention is not waived." Pet. App. 9a (citing *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720, 725 (8th Cir. 2002). Petitioners do not challenge, or even acknowledge, this holding. *See, generally,* Pet. at 15-17.

"It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Indeed, the "matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeal, to be exercised on the facts of individual cases." *Id.* at 121. Exercising this discretion, the Eighth Circuit concluded that Petitioners had waived their argument that the District's policies were facially discriminatory. Pet. App. 9a.

Because the Eighth Circuit ultimately concluded that Petitioners waived their *Johnson Controls* argument, and because Petitioners have not challenged this aspect of the Eighth Circuit's decision, this Court's review of the merits of that argument would not affect the outcome of this case. Any such review would only result in an advisory opinion, the likes of which this Court has steadfastly refused to issue in the past. *See, e.g., Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 516 (2007) (recognizing that "no justiciable controversy exists when parties...ask for an advisory opinion...") (citing *Hayburn's Case*, 2 Dall. 409, 1 L.Ed. 436

(1792)); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936), *Alabama v. Shelton*, 535 U.S. 654, 674-75 (2002) (Scalia, J., dissenting, joined by Rehnquist, C.J., Kennedy, J., and Thomas, J.).

B. The Eighth Circuit's Discussion of Title VI is Firmly Rooted in this Court's Jurisprudence

After concluding that it was "hard pressed to see why [Petitioners' *Johnson Controls* argument] is not waived," the Eighth Circuit went on to disagree with the merits of that argument. *See, generally,* Pet. App. 9a-11a. In this regard, Petitioners assert that the Eighth Circuit misapplied the *Johnson Controls* case. Pet. at 15-17.

Petitioners' argument completely overlooks the scope of the Court's *Johnson Controls* decision. The *Johnson Controls* case involved a challenge under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e ("Title VII") to a company "policy that all women who are pregnant or who are capable of bearing children will not be placed into [certain] jobs." 499 U.S. at 192. In finding that the policy violated Title VII, the Court noted that "[t]he bias in Johnson Controls' policy is obvious. Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job." *Id.* at 197. The Court then recognized that the "policy explicitly discriminates against women on the basis of their sex." *Id.* Finally, the Court held that the policy "is facially discriminatory because it requires only a female employee to produce proof that she is not capable of reproducing." *Id.* at 198.

Unlike the policy at issue in *Johnson Controls*, the District's policy does not "explicitly discriminate" against any person on the basis of any protected class. Instead, MDE held that that "the District did not evaluate ELL students until they have been in ELL for three years." Pet. App. 85a. As the Eighth Circuit observed, Title VI does not prohibit discrimination on the basis of English language proficiency. Therefore, a policy that expressly differentiates between students based on such proficiency, as opposed to national origin, does not "facially" violate Title VI. Pet. App. 10a (gathering law).

The District's unwritten policy in question is applicable to all "English Language Learner" students. *See* Pet. App. 85a. Petitioners, in addition to being foreign-born, are ELL students. *See* Pet. App. 26a (describing Petitioners' familiarity with the English Language); *see also* Pet. at 5-6 (discussing District policy of testing "ELL students" for special education). At no point in this case have Petitioners been able to demonstrate that the policies were applied to them because they were foreign-born, rather than because they were ELL students. *See* Pet. App. 39a-41a. In fact, eleven of the thirteen Petitioners were unable to establish that they suffered any harm as a result of the allegedly discriminatory policy. *Id.* at 40a.[5]

In light of their inability to demonstrate discriminatory intent, Petitioners assert that the fact that the District's policy, which is applicable to every

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[5] The Petition does not seek review of the Eighth Circuit's conclusion that eleven out of thirteen Petitioners "suffered no injury from the delayed testing." *See* Pet. App. 9a.

student in the District, was applied to foreign-born students enrolled at ALHS renders the policy "facially" discriminatory. Put another way, Petitioners assert that, because the District's policy had a disparate impact on students of certain national origins, they are relieved of their burden to prove discriminatory intent. Petitioners' argument obviates this Court's well-settled distinction between cases of "disparate impact" and those of "intentional discrimination." Petitioners blithely ignore this Court's past rulings that Title VI only prohibits intentional discrimination, and seek to distort the very framework used by this Court to determine whether intentional discrimination has occurred. The Eighth Circuit's rejection of Petitioners' arguments is firmly based in this Court's jurisprudence.

It is "beyond dispute" that Title VI "prohibits only intentional discrimination." *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)). As this Court has held, "cases of intentional discrimination [are those] that do not rely on the disparate impact theory of discrimination." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 534 (1999). Petitioners' attempt to demonstrate intentional discrimination on the basis of an alleged disparate impact ignores this distinction and erodes the Court's holding that Title VI does not prohibit actions which have a disparate impact on individuals, but which are not intentionally discriminatory.

As discussed above, the *Johnson Controls* case involved a policy that, by its plain terms, applied only to "women who are pregnant or who are capable of bearing children." 499 U.S. at 192. Thus, by its plain terms, it was "facially" discriminatory. *See Id.* at 198.

Unlike the policy at issue in *Johnson Controls*, the District's testing policy was applicable to all ELL students, not only those of a foreign national origin. Pet. App. 85a. Therefore, the *Johnson Controls* decision is inapposite to the instant situation.

The District Court and the Eighth Circuit concluded that the District had a nondiscriminatory basis for the application of its testing policies; specifically, that it waited until Petitioners' had a better grasp of the English language before it tested them for special education needs. *See* Pet. App. 41a. As the lower courts noted, this is a legitimate, nondiscriminatory, educational reason for distinguishing Petitioners from other individuals. *Id.* Therefore, it entitled the District to summary judgment on Plaintiffs' Title VI claims. *Id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Contrary to Petitioners' bald assertion, the District's policy was not a facially discriminatory policy like the one at issue in the *Johnson Controls* case.

Despite Petitioners' contentions, there is no conflict between the Eighth Circuit's decision in this matter and the Court's *Johnson Controls* case. Review of this decision would not settle any important point of federal law and is unnecessary in light of this Court's past guidance on the issues presented in the Petition.

IV. THE EIGHTH CIRCUIT'S INTERPRETATION OF TITLE VI DOES NOT OFFEND PUBLIC POLICY

In the final pages of their Petition, Petitioners assert that allowing the Eighth Circuit decision to

stand would result in the circuit-wide creation of a segregated school system. *See, generally,* Pet. at 17-19.[6] None of Petitioners' dire prognostications, however, would be averted by any ruling on the narrow legal issues presented in this case.

For instance, Petitioners have not asserted that the lack of a damages remedy under the EEOA will contribute to a segregated school system. Nor have Petitioners even attempted to link their assertion that "school choice itself promotes segregation-in-fact" to any legal argument raised at any stage of these proceedings. *See* Pet. at 18.

Similarly, Petitioners opine that "courts are in dire need of a rule to find disparate treatment where there are facially discriminatory policies at work." Pet. at 19. The Court outlined such a rule in its *Johnson Controls* case. However, despite Petitioners' assertion, no "facially discriminatory" policies are at work in this case. Petitioners' public policy, like Petitioners' legal argument, blurs the line between policies that have a disparate impact on certain individuals, and those that are intentionally discriminatory; a line that this Court has previously developed. *See, e.g., Kolstad, supra.*

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[6] While Petitioners allege numerous deficiencies with the education provided at ALHS, the lower courts recognized that, at most, "[Petitioners'] evidence suffices to create a jury question as to the appropriateness of [the District's] efforts to overcome [Petitioners'] language barriers." Pet. App. 43a (discussing EEOA claim); *see also* Pet. App. 33a, 35a (concluding that, at most, Petitioners' evidence supports a "disparate impact" claim under Title VI), and App. 5b (addressing the appropriateness of the programming at ALHS).

In fact, the Eighth Circuit's decision is amply supported by policy concerns that this Court has previously identified. In its *Flores* decision, the Court cautioned federal courts against substituting their "own educational and budgetary policy judgments for those of the state and local officials to whom such decisions are properly entrusted" when considering EEOA claims. 129 S.Ct. at 2597. With the exception of their claim related to special-education testing, Petitioners' numerous allegations concerning the educational programming provided at ALHS are simply no longer an issue in this lawsuit. The only question before the Court are those properly named in the Petition; namely whether the EEOA allows for Petitioners to maintain a suit for money damages or whether the Eighth Circuit erred in determining that Petitioners were required to prove discriminatory intent to maintain their Title VI claims.

As the Court has cautioned, "educational and budgetary policy judgments" are best left to school districts and State educational agencies. *Flores*, 129 S.Ct. at 2597. The MDE, Minnesota's educational agency, has already determined that the District has properly amended its practice (or unwritten policy) regarding special education testing and ELL students. App. 1b-2b. Therefore, there is no concern that future generations of students enrolled in the District will be exposed to the same policies that form the basis of Petitioners' initial lawsuit. This Court's intervention on the grounds that ALHS allegedly provided Petitioners a substandard education for other reasons would be directly contrary to the Court's direction in *Flores*.

Moreover, as the District Court recognized, "it would be extraordinary if Congress had authorized money damages under the EEOA given the potential for such awards to bankrupt school districts." Pet. App. 45a. Indeed, given that the EEOA pertains to every school district in the country, reaching such a conclusion would potentially imperil the precarious finances of school districts from Maine to California, not just those in the Eighth Circuit.

The Eighth Circuit's decision in this matter forwards public policy. Petitioners' public policy concerns cannot be redressed by a decision of this Court on any of the legal issues involved in this lawsuit. No further review of this mater would benefit any matter of public policy.

CONCLUSION

For the foregoing reasons, Respondent Special School District Number 1, Minneapolis Public Schools, respectfully requests that the Court deny the Petition.

Respectfully submitted,

RATWIK, ROSZAK & MALONEY, P.A.

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ATTORNEYS FOR RESPONDENT
SPECIAL SCHOOL DISTRICT NO. 1,
MINNEAPOLIS

Dated: December 29, 2010

APPENDIX

APPENDIX

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APPENDIX A

Minnesota Department of Education

April 4, 2007

Thandiwe Peebles
Minneapolis SSD # 001
807 NE Broadway
Minneapolis, MN 55413-2398

Ladan Bashir Yusuf
PO Box 14892
Minneapolis, MN 55414

Re: Complaint File # 2132

Dear Superintendent Peebles and Ms. Yusuf:

After reviewing the documentation provided by the District and receiving confirmation that the parent meetings were held, this letter verifies the District's completion of corrective action for the above referenced complaint. The complaint is hereby closed.

If you have any questions or concerns, please contact me by phone at 651.582.8844 or by e-mail at susanne.thomas@state.mn.us.

Sincerely,

/s/ Sue Thomas
Sue Thomas
Due Process Specialist
Division of Compliance and assistance

ST:JP

C Kim Mesun

1500 Highway 36 West, Roseville, MN 55113-4266
651-582-8200 TTY: 651-582-8201

education.state.mn.us

APPENDIX B

EXPERT WITNESS REPORT

for

Mumid et al. vs. Abraham Lincoln High School, et al.

Prepared by

Roberta Vann, Ph.D.
Professor, Iowa State University
and

Afra A. Hersi, Ph.D.
Assistant Professor, Loyola College, Maryland

August 1, 2001

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SECTION 1: REPORT OVERVIEW

We have been asked by counsel to review materials relating to the case of Mumid *et al.* vs. Abraham Lincoln High School (ALHS), *et al.* and to address the extent to which actions by the school were unfair to the plaintiffs, specifically the extent to which ALHS took appropriate action to overcome language barriers that impeded equal participation by English language learners (ELLs) in the school's academic programs. The evidence we reviewed shows ALHS to be a typical newcomer school with reasonable and appropriate practices. Staff were qualified and dedicated and the curriculum was sound. The school served students fairly in its practices and most students made reasonable progress. We saw no evidence that suggests staff intentionally discriminated against students.

Contributing to our judgments is current research. First, we summarize that research to provide a context for understanding the complex issues faced by schools and districts that serve adolescent English language learners (ELLs) who are non-literate and unschooled. This research, though somewhat sparse where this population is concerned, supports our opinion that:

1) **Not all English Language Learners are alike. Recent immigrants and refugees present school districts with unique challenges at a time of fiscal shortfalls and this calls for unique rather than formulaic solutions.**

2) **A variety of individual, home, and community factors contribute to both academic success and language learning**

success, many of which are beyond the school's control.

3) **Experts do not always agree on the best methods for teaching English. Bilingual education is not the only reasonable and sound choice for a school.**

4) **Newly mandated assessment requirements do an inadequate job of assessing ELLs, especially in terms of academic English needs. Relying too much on these instruments to measure ELL academic progress is a mistake.**

5) **Newcomer schools are one recent innovative solution to address the need for accelerated education in young adults with little or no prior schooling and limited English proficiency. These schools are in some ways still experimental.**

We next present our examination of evidence from ALHS, beginning with the staff and continuing with the curriculum and other programs, noting that:

AHLS is a typical newcomer school (Short and Boyson, 2004) that addresses the needs of the student population it serves.

a. Program features are similar to those of other newcomer schools.
b. AHLS staff are qualified and dedicated.
b. The majority of AHLS staff uses best practices.

c. AHLS curriculum is appropriate and reasonable in its:
    i. Approach and methods
    ii. Materials and techniques
d. AHLS support programs are appropriate.

Finally, we present our analysis and evaluation of the specific cases of the plaintiffs, referring to both student records and depositions. We summarize and conclude that:

1) **In general ALHS did a good job of working with students, teaching them, and supporting their needs to the extent reasonably possible.**

2) **Students appeared to have unrealistic expectations, little understanding of school and what a diploma represents.**

3) **A variety of factors contributed to the progress of students, many of these beyond the mission of the school.**

4) **Assessment and intervention for special education, based on the evidence we have seen, was not implemented perfectly for all parties; this is not surprising given the well-documented difficulty of disentangling special education needs from deficits in a student's schooling, language issues, and other factors effecting education. We see no evidence of ill-intent or discrimination on the part of staff.**

SECTION 2: DOCUMENTS REVIEWED

I. Licensing Documents Including:

A. Licensure and Other Permissions for Teaching during the 2005-2006 School Year
B. Memorandum from Minnesota Board of Teaching dated April 2005
C. Teaching Staff Licensure & Assignment dated November 26, 2002
D. Teacher Licenses dated June 15, 2005 -
E. ALHS Teachers Licensure Budget dated 2001-2003

II. Individual Plaintiff Information for Test Scores for Each Plaintiff Including:

A. Graphs of MBST Scores
B. Graphs of MBST Writing Scores
C. Graphs of MTEAE Writing Scores
D. Graphs of MTEAE Reading Scores
E. Charts with Documents Supporting Graphs
F. Documents supporting Charts and Graphs with MBST and MTEAE Scores

III. Handbooks, Manuals, Improvement Plans and Reports

A. ELL State Funding Packet dated October 5, 2001
B. Staff Handbook dated 2001
C. INA – Employee Manual Revised September 15, 2003

D. INA Employee Manual Revised May 2006
E. ALHS Course Offerings 2001 – 2002
F. ALHS Student Handbook 2003 – 2004
G. ALHS Course Offerings 2004 – 2005
H. LIHS Student/Family Handbook 2005 – 2006
I. ALHS School Improvement Plan 2004 – 2005 (submitted October 2004)
J. MPS School Improvement Plan Feedback for ALHS Spring 2000
K. School Improvement Plan 2003 – 2004
L. School Improvement Plan 2002-2003
M. ALHS Annual Report and School Improvement Plan 2001 – 2002
N. ALHS Annual Report 2002 – 2003
O. 2005 Annual Report for MLPS from ALHS 2005
P. ALHS School Information Report 2000 – 2001
Q. ALHS Information Report 2001 – 2002
R. ALHS Information Report 2002 – 2003
S. ALHS Information Report 2004 – 2005
T. ALHS Information Report D002157

IV. Staff Development Documents

A. MFAS Fall Workshop Schedule
B. All Staff Meeting Proposed Yearly Calendar & Activities
C. High School Counselor Conference 2001 Agenda
D. MAAP Conference Registration - Sandy Sample
E. Staff Development Memo

F. Email from Mohamed Wadi to Mary Barrie re participation in workshop March 5th

G. Mpls Public Schools Secondary Mathematics District-wide Staff Development Franklin Middle School Agenda

H. Upcoming Professional Development Opportunities for Teachers of Mathematics
Secondary Staff Development, Parent Conference, Grading, Flex and Standards Implementation Dates

I. Email from Katie Gagstetter to Nata Samb re Somali Language and Literacy Conference

J. Minneapolis Public Schools Community Academic Summit Notice

K. Staff Development Day Agenda

L. Email from Aly Xiong to Joel Gibson and Nata Samb re EFF Training

M. ALHS Staff Development Day Agenda

N. Email from Aly Xiong to district re 504 Training

O. Email from Nata Samb re All Staff Meeting April 19, 2005 re MCA training and presentation on special education

P. Email from Aly Xiong re Peer Observation

Q. Email from Nata Samb re Staff Development Agenda

R. Email from Stephanie re Monday Staff Development

S. Faculty Development Plan for Working with English Language Learners

T. Minneapolis Public Schools Curriculum and Instruction Memo re July Probability and Statistics Workshop at Macalester College

U. Email from Nata Samb to Joel Gibson re Court re Teaching Middle and Secondary Immigrant/Refugee Students

V. Email re District Literacy Training

W. Email re District Staff Development Day

X. Email re Staff Development Training

Y. All Staff Meeting Agenda

Z. Abraham Lincoln High School All Staff Meeting Agenda

AA. Staff Development 101 Workshop

BB. Email re staff meetings

CC. Email re Academic Planning - All Staff Training

DD. Academic Planning - All Staff Training/Staff Development Schedule

EE. Email re SIP Classroom Observations

FF. Email re Staff Development Team

GG. Staff Development Committee Notes

HH. Certificates of Participation of Education Minnesota Professional Conference - Nata Samb

II. Certificate of Participation Staff Development

JJ. Certificate of Participation Staff Development

KK. Certificates of Participation Staff Development

LL. Criteria for Spending Staff Development Funds

MM. Staff Development Additional Information

NN. Community Action Summit Workshop

OO. Working with English Language Learners: Second Language Acquisition and Making Instruction Accessible
PP. Working with Parents of English Language Learners
QQ. Gallinger Center for Effective Education Service Contract/Price List
RR. Chart summarizing teacher licenses and education

V. Deposition Transcripts of:

A. Individual Plaintiffs
B. Joel Gibson
C. Nata Samb
D. Mohamed Wadi
E. Mary Barrie
F. Linda Huntzicker

VI. Curriculum/Course Outlines for the following Subject Areas:

A. History
B. Science
C. English
D. ELL
E. Computers
F. Math

VII. Plaintiffs Expert Report

A. Report of expert witness, Dr. Martha Bigelow

VIII. Teachers at ALHS

A. Licensing Information
B. Resumes
C. Transcripts/Verified Credential Reports
D. Chart listing education and licensing information

IX. Timelines of Students

X. Additional Documents

A. Minn. Stat § 124D.68 Graduation Incentive Programs
B. Minn. Stat. § 120A.20 Admission to Public School
C. Minn. Stat. § 120B.024 Graduation Requirements; Course Credits
D. Minneapolis Public Schools ELL District Guidelines
E. Minneapolis Public Schools Policy 6280
F. Minnesota Department of Education K-12 Academic Standards, Required State Tests and Graduation Requirements
G. Correspondence regarding age requirements
H. Minneapolis Public Schools Graduation Requirements and MBST Exemption ELL students;
I. Summary of Survey results
J. School Information Reports 1999-2000, 2001-2002, 2002-2003, 2003-2004
K. MBST Summary
L. School Improvement Plans 2000, 2001-2002, (ABLHS Restructure Plan), 2004-2005, 2005-2006

M. ABLHS Annual Reports 2002-2003, 2005
N. Minnesota Department of Education Complaint and Closure letter

XI. Student Records

A. Intake Records
B. Attendance Records
C. Registration Form 13
D. Health/Immunization Records
E. Tutoring Records
F. E-Mail Correspondence from teachers specific to an individual Plaintiff

SECTION 3: RESEARCH

1. Not all English Language Learners are alike. Recent immigrants and refugees present school districts with unique challenges at a time of fiscal shortfalls and this calls for unique rather than formulaic solutions.

Different kinds of ELLs and no "one-size fits all" solution

The number of English language learners (ELLs) has increased dramatically in the U.S., nearly doubling between 1992-2002 and representing almost 8 times the rate of total student enrollment (Peregoy & Boyle, 2005). Not all ELLs are alike. Some are second or third generation children born in the U.S. Others are recent arrivals. Some are fluent in one language while others are multi-lingual (Batalova, Fix, & Murray, 2005; Suárez-Orozco & Suárez-Orozco, 2001). Some are from professional families; some come to the United States with their families as children and have many years to

learn English; others arrive as young adults. The ELLs facing the greatest challenges are immigrants and refugees from low socio-economic backgrounds who are below grade level, lacking even basic math and literacy in their first language (Ruiz-de-Velasco, & Fix, 2000). In addition to the poverty and educational gaps such individuals also face culture shock in adjusting to life in a new country. Those who are refugees and who fled from war and violence face additional psychological stress resulting from previous trauma.

These students need to adjust to a new culture, and often help support families while recovering from their own health and well-being, all the while making up for lost years of academic preparation before they reach the age when they are no longer allowed to remain in a traditional or even alternative free public school and must instead opt for an adult education alternative. These are needs that often cannot be met by traditional public schools.

Impact on Schools

School systems with only a few ELLs 10 years ago may now find 25% to 30% of their classrooms filled with a new diversity. While enriching our nation, this change in demographics presents great challenges for school systems economically[1] and pedagogically. These challenges have been accentuated by the demands of *No Child Left Behind Act of 2001* (NCLB) with its

---

[1] There is disparity between school population and resources, with larger numbers of immigrants at the secondary level, but greater spending for elementary schools. Consequently a smaller proportion of secondary ELLs receive support services (Ruiz-de-Velasco & Fix, 2000).

mandated curriculum standards and standardized testing for all students. The NCLB places tremendous pressure, not always educationally productive, on schools, especially those whose students tend to score lower on standardized tests than their middle-class white peers, for which schools are penalized. Schools are thus struggling to adjust to a challenging new student population under new external pressures at a time when funding is short. Unfortunately, solutions for those challenges have been slow in coming. Theory and methods more abundant for younger, elementary school ELLs is still developing for older learners, especially those struggling with literacy (Brisk, 2000; Faltis, 2001). Likewise, appropriate means of assessment are still in need of development.

2. A variety of individual, home, and community factors contribute to both academic success and language learning success, many of which are beyond the school's mission.

Factors that contribute to the academic success of English Language Learners

Research on adult, language learners who are pre-literate has lagged behind other kinds of research on second language learning. For example, we know a great deal about college students learning ESL or foreign languages and much about elementary school students, but relatively little about the new language learners entering our schools, especially about how best to teach what is needed for advanced academic language proficiency.

What we do know is that: 1) Being an immigrant itself is associated with an increased risk of dropping out.

For example, the dropout rate of Hispanic immigrants is more than double that of native-born Hispanics (Short and Fitzsimmons, 2007). Many interdependent factors are associated with academic success for language learners. Characteristics of the individual learner as well as the home, school, and community in which he/she lives are influential. It is important to note, as Brisk, Burgos, and Hamerla (2004) point out, that factors related to academic success are interconnected.

Individual factors

Prior Schooling: Students who have disrupted schooling or no schooling at all are at increased risk for significant difficulties in school (Haines, 1985; Portes & Rumbaut, 2001). Little or no schooling is often typical of refugees who have fled long-term wars.

For example, though education is highly valued in Somali culture, twelve years of civil war disrupted the education of an entire generation of Somali children. While some had access to school in refugee camps, parents and family members often had to pay to send their children to school (Hersi, 2005).

Literacy: Literacy is intertwined with schooling and both are highly tied to school success, with formal schooling in one's native language being a strong predictor of second language achievement and success in school (Thomas and Collier, 2002). However, literacy knowledge comes from other sources besides formal schooling. This, includes the literacy practices provided by families and communities (Heath, 1983) such as reading to a child as well as modeling reading and writing in everyday life. It is important to note

that learning to read and write is in a sense, "unnatural" in that not all languages have a script and learning to read and write is not inevitably acquired. For example, Somali had no written form until 1972 when a Somali script was adopted based on the Roman alphabet. On the other hand, Somali culture has a rich tradition of oral literature, including poetry, narratives, and places a high value on articulate communication.

Age: The age at which the student begins school influences success. While adolescents and young adults can learn well, even the most motivated and intelligent student who arrives at age 17 having had little or no prior schooling will be hard-pressed to make up 12 years of school, while adjusting to a new culture, learning a new language, etc. What's more, such students need to learn in record time. As Short and Boyson (2004, p.3) discuss, "overage, under-schooled youth" are enrolling in public schools in record numbers and often fail to meet graduation requirements before they are forced to leave free public schools.

Health and biological disposition: Besides social factors, the physical condition of the learner also plays some role. As learners, we have strengths and weaknesses that are in part both biological and environmental. Siblings from the same family may differ in academic achievement as a result of cognitive differences, their diet, the hours of sleep they get, etc. A student who was nutritionally deprived or suffered trauma as a child may be adversely affected and unable to perform as well as is required for academic success (Call & Magnuson, 2005).

Motivation: Motivation has long been recognized as an important factor in learning; low motivation may manifest itself in poor school attendance or attentiveness to learning. While there are many reasons why a student may be more or less motivated to attend regularly and work hard in school, motivation is clearly associated with success in learning, including language learning (Ellis, 1994) and one outcome of motivation, attendance, is one measure of school quality. Of course whether or not a student has a high motivation to learn, attends school, and is attentive to learning is connected in part with other factors, including home and community and one's motivation for schooling may vary over time.

Home factors

Parental support: Parental support for education is another factor that has been associated with school success. Families support children's school success in many ways, encouraging their children to do well and making it a priority. Immigrant parents, like other parents, typically want their children to succeed in school (Delgado-Gaitan, 1990) and encourage them to do so. However, a non-literate parent struggling to adjust to a new culture who is working many hours each week will not be able to read to a child, a factor strongly associated with reading success, or interact in many ways that support learning, e.g. helping the son or daughter with homework, providing access to a computer, and incorporating literacy into family life via an abundance of books.

Socio-economic level: Part of what it means to support one's child's education is tied to one's socioeconomic level. Dependence on public

transportation, shortage of cash to pay for it, and families who may desperately need another working member typically mean less time for school work and related activities by the student. Not surprisingly, research finds that a family's socioeconomic status in their country of origin and in the United States is a key factor in predicting ELL student achievement in American schools (Ovando, Combs, & Collier, 2006) with those at lower *socioeconomic levels* having lower success rates, including lower graduation One study (Martin, et al. 2000) showed that families that had a high level of educational resources (more than a hundred books, a desk, a computer and one parent who had finished college) had higher achievement in science and math. Unfortunately, newcomers are at a greater risk of poverty than other groups (Waggoner, 1999) with the poverty rate among foreign-born immigrants tripling since 1970 (Ruiz de Valasco & Fix, 2000).

Community Factors

Attitudes and perceptions: *Attitudes and perceptions* toward certain ethnic groups in a community also influence school success; a positive perception of students' culture and language has been shown to have a positive effect on success in school, while the perception of discrimination has been associated with negative effects on academic success (Portes, 1999).

Role models: While middle class and upper class communities typically have many *role models for success,* lower socioeconomic students may have few or none, especially in mainstream schools where teachers are frequently white and middle-class. Schools that

have teachers and staff that reflect students' heritage culture and language are likely to provide such role models.

School-related factors

School and class size: For many years, educators and researchers have debated which school variables influence student achievement. As stakeholders, including government and the business community, become involved in school reform, this question takes on new importance since their many initiatives rely on presumed relationships between various education-related factors and learning outcomes. Some research has suggested, "schools bring little influence to bear upon a child's achievement that is independent of his background and general social context" (Coleman et al., 1966, p. 325; see also Jencks et al., 1972). Other research suggests that factors like class size (Glass et al., 1982; Mosteller, 1995), teacher qualifications (Ferguson, 1991), school size (Lee & Smith, 1997), and other school variables may play an important role in what students learn. For example, studies show that small schools have higher attendance rates, higher grade-point averages, lower dropout rates and improvements in academic performance (Lee & Smith, 1993). Similarly, research suggests that smaller classes improve academic performance for all children, particularly minority students from low socio-economic backgrounds (Glass et al., 1982; Molnar, Smith, & Zahorik, 1999).

Teacher Quality: Teacher quality consistently ranks as one of the top concerns for educators, researchers, politicians, and policymakers (Cochran-Smith, 2003). This is no doubt due in part to the shortage of well-

qualified teachers faced by virtually every state (Allen, 2003). It is also due to the growing body of evidence which suggests teacher quality enhances student learning (Cochran-Smith, 2004). However, exactly what constitutes an effective teacher is still hotly debated. On the one hand, researchers have argued that effective teachers are knowledgeable in their content area and in pedagogy, have teaching experience, and have been prepared through teacher education (Darling-Hammond, 2002). On the other hand, some experts argue that effective teachers only need to have high standardized test scores (e.g. on the Scholastic Aptitude Test (S.A.T.) and need only be knowledgeable in their subject-matter (Walsh, 2001; Kanstroom & Finn, 1999).

Many states, including Minnesota, are experiencing teacher shortages in critical areas including math, science, special education, and world languages (Teacher Quality Compensation: Program overview). One recent report listed foreign language, special education, vocational education, and ESL as being the most difficult areas to fill for 1999-2000. Shortages of teachers were disportionately high in urban areas, and in schools with higher minorities and more students on free and reduced lunches (Murphy, DeArmond, & Guin, 2003).

Time, content, support: Spending time on instruction, providing content instruction and providing students with support for academic learning are all associated with school success for ELLs. The Minneapolis district guidelines for ELLs emphasize adequate instructional time, including time spent on language development, content instruction and support for academic classes (District guidelines for

ELLs, p. 100) as factors that contribute to school success.

Language issues

The extent to which learners know the language of instruction, especially as it is used in academic situations, the greater their likelihood of success (Delpit, 1995; Health, 1983; Wong-Fillmore, 1982; Scarcella, 2002). Because language learning is so important for school success, we discuss it in more detail below.

Factors that contribute specifically to language learning success

The basics: Exposure to the language, opportunity to interact, and a safe environment

First language acquisition: Virtually all human beings acquire at least one language, their mother tongue, and worldwide, most human beings are multilingual. Generally speaking, a second language, *if one wishes only everyday conversational competence,* can be acquired in much the same way as one's native language. What is required is sufficient *exposure* and sufficient *opportunity to interact in the target language,* that is, the language one wishes to learn, in an *environment in which the learner feels safe.*

Second language acquisition: Unlike first language acquisition, which occurs universally and takes relatively the same length of time for most children around the world, second language learning and the learning of literacy varies a great deal. Many linguistic, individual, social and cultural differences

that learners bring to a language learning situation influence the likelihood of their success in mastering literacy skills and the English proficiency needed for academic success. These include time on task, age, and differences between the learner's heritage language and the language he/she is learning and one's prior experience learning languages.

Academic Language Proficiency: The extent to which learners know the language of instruction, especially as it is used in academic situations, the greater their likelihood of success (Delpit, 1995; Heath, 1983; Wong-Fillmore, 1982; Scarcella, 2002). The English language skills students need to participate effectively in school, so-called *academic English*, are considerably more complex than is ordinarily assumed. Indeed, many of the academic subjects taught in secondary schools will be out of reach if students lack fairly high levels of English. Academic language is increasingly being recognized as a barrier that must be addressed for learners to succeed (Bailey, 2007).

Time on task: Years needed to acquire academic language proficiency in English

The length of time one spends being exposed to the target language and studying it is one of the most important factors in language learning. According to research, 4-8 years are needed for a learner to reach the level of English needed for academic success. Cummins (1984) distinguishes between basic interpersonal communication skills, which learners typically acquire much sooner, often in as little as 6 months. An example is a hallway or cafeteria interchange between peers. Cummins contrasts this

the more abstract language of academic work, found in textbooks and much classroom discussion, which takes longer to acquire and is strongly tied to academic success. In recent years a number of methodological approaches have developed out of this recognition.[2]

Age

Age plays a role in learning a second language. Around puberty, certain aspects of language, namely the extent to which one can acquire a new language and speak it with a native-like accent, are sharply reduced for all but a few rare learners. On the other hand, some aspects of second language learning may be enhanced for older learners, at least for literate and linguistically aware adults. For example, an adult who reads in his/her native language will potentially have advantages over a preliterate child or adult in being able to use texts to learn about the target culture and language, take notes to add memory, etc. These factors are especially important for learning academic language learning.

Older learners also seem to have advantages in acquiring the grammar and the vocabulary of the language as well. Adolescents and adults have world knowledge they can bring to benefit their own language learning. However, much of the research on second language acquisition comes from studies of fairly well educated adults who are literate in their

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[2] One of the best known is the Cognitive Academic Language Learning Approach (CALLA) developed by Chamot and O'Malley (1994) and Chamot, (2005) which suggests that actively learning strategies can play a great role in academic language learning.

native languages and who are learning in formal settings, often in universities. We have far less research on the language learning of preliterate adults.

For many adolescent and adult learners, gaining the opportunities for language interaction is more difficult than it is for children, because of the pressures of work and family obligations and the difficulty of entering new linguistic communities, especially for someone who is introverted and/or whose heritage culture and language is not viewed favorably. Older learners who find or seek out opportunities to interact in the target language typically meet with greater success.

Heritage and target language and cultural similarities

Similarities between the heritage language of the student and the school language can be a factor in learning a language and thus ultimately affect school success. Generally speaking, speakers of languages that are closer to the target language will learn those languages more quickly.[3]

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[3] For example, a speaker of Dutch will typically learn English more quickly than a speaker of Chinese or Arabic under the same conditions will learn English because Dutch has more possibilities for positive transfer to English than do the latter languages, including grammatical features and loan words recognizable by speakers of both languages. Rather extensive research at the Foreign Service Institute has provided us insight into these differences, so while linguists would argue that no language is really innately easier than another, some second languages will be easier for some learners because of their first language background. For example, students who are speakers of Somali and Oromo will face greater linguistic differences between their

For example, among language teachers, Arabic speakers are generally known to acquire spoken English more easily and to speak more like a native-speaker than, for example many Chinese, but Arabic-speakers typically have greater difficulty with written language skills than do Chinese-speaking who are studying English.[4]

Other factors

No two learners are exactly alike. In addition to the factors discussed above, a variety of other factors affect the second language learning of adolescents and adults. These include *motivation, general intelligence, language aptitude,* and the use of *positive learning strategies* as well as *attitudes* of the learner toward the

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native languages than will Spanish speakers learning English. Likewise, learners who lack written literacy in their first language will find increased challenges in learning to read and write English.

[4] This tends to manifest itself on the standardized Test of English as a Foreign Language (TOEFL) with Arabic speakers scoring higher in listening comprehension than in Grammar and Reading. One likely reason probably has to do with the different roles that oral and written language plays in the respective cultures and the relative value some societies place on one over the other. To illustrate: A graduate student one of us knew from Sudan once shared that she had to "fight" to do homework because her parents found it odd that she would want to go to her room and study instead of talking with family and friends. A Japanese student who was part of the same conversation, was shocked at the parental attitude of her classmate's parents; her own parents made homework mandatory as soon as she walked in the door. This illustrates how family values support certain preferences for using language, e.g. speaking and listening vs. reading and writing.

target language and culture and of the majority language community toward the language of the learner (Ellis, 1994). Learners vary in the accuracy of their pronunciation, in their abilities to comprehend spoken discourse, in their fluency, in the extent of their vocabularies, their reading speed and comprehension, and their writing fluency and grammatical knowledge. The factors we have presented suggest some of the key reasons for this variability.

3. Experts do not agree on the best methods for teaching English. Bilingual education is not the only reasonable and sound choice for a school.

Current approaches and favored methods of teaching English to newcomers

"Natural" approaches vs. grammar-based approaches

There are many curricular approaches and methods suitable, but often hotly debated, for teaching English as a second language, especially where adult learners are concerned. Basically, these might be best understood as three continua. The first continuum is one with "natural," interactive, and communicative approaches at one end and formal, grammar-based approaches on the other.

Theories of Language Learning	
Natural	**Formal**

Theorists who support natural approaches emphasize the *similarity* of first and second language learning.

For these theorists, learning a second language mirrors how we learn our mother tongues (Krashen, 1982). At the other end of the continuum are approaches that focus more on formal language learning involving written texts and grammatical awareness (Schleppegrell & Columbi, 2002; Hinkel, 2004). Approaches at this end tend to appeal to those who emphasize the *differences* in first and second language learning. While some learners are more comfortable with the more easy-going approach of the "natural" approach, many experts now see this as deficient in providing the kind of structured training that prepares students for the academic language they need for school success. One authority on academic writing, Eli Hinkel, suggests a disconnect between the teaching methods and the evaluation criteria used in writing instruction for ELLs with ". . . the essential linguistic skills, such as academic vocabulary and formal features of grammar and text" rarely or inconsistently addressed (Hinkel, 2004, 6). In reality, most teachers in classrooms we have visited use a combination of methods, utilizing both communicative techniques and some attention to recognizing grammatical form.

English immersion vs. bilingual models

A second continuum presents a focus on the target language, in this case, English, versus a focus on preserving the heritage language via some form of bilingual instruction. Examples range from classes taught exclusively in English with total immersion (in reality submersion programs) to two-way bilingualism at the other end.

Approaches to Language Teaching

Total Immersion **Bilingual**

An example of total immersion would be simply enrolling a student in a mainstream school with no language support of any kind. An example of a two-way bilingual program, of which there are many permutations, would be a school in which subjects are taught on some days or by some teachers in the heritage language, e.g. French in Quebec, and on days or by other teachers, in the second language, e.g. English.

Ellis (1994) in summarizing the research on immersion classrooms points out that there is general agreement that immersion programs are "very effective" (p. 226). Three key features are important: 1) language that is comprehensible to students, 2) learner's identity is not threatened, 3) immersion programs are optional.

In reality there are many versions of "immersion" and "bilingual" education and many forms of target language support.[5] These range from the traditional

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[5] An "immersion" or direct method model could on one extreme be a school that forbade any language but the target language, including written materials in the home language. This method has been used by Peace Corps and the US Army in an attempt to speed up learning of foreign languages and notoriously with Native Americans in an attempt to wipe out their home cultures. A more acceptable version of immersion today is one in which students receive most instruction in English, but with considerable assistance from bilingual aides, bilingual dictionaries, peer tutors, computer-assisted programs, and other support and in which academic English is specifically taught. In such settings the heritage language is valued and while students

"pull-out" ESL classes in which students are immersed in mainstream classes for a portion of the day and pulled out into ESL classes for the remainder of the day, to "push-in" models in which ESL teachers team up with mainstream teachers to support ELLs in their content classes. Another variation near the middle of the immersion-bilingual continuum involves mainstream classes that incorporate bilingual teachers and/or individual bilingual aides. A popular model often referred to as "sheltered" instruction teaches content classes in English, but utilizes techniques to make the content more accessible by providing English support and in some cases simplification as well as guidance in learning strategies to foster both language and content learning.

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are encouraged to interact in the target language, they are never punished for speaking their home language. Such a model is practical in a setting where several heritage languages are represented and where it is not economically possible or feasible to find sufficient qualified bilingual instructors in all languages represented. For example, in the Des Moines School District, which has some 70 languages represented it is difficult to apply a bilingual model, which might be well-suited for El Paso or Miami, or even West Liberty, Iowa. Even when bilingual instruction is not feasible, teachers can and do use a variety of techniques to encourage the preservation of heritage languages.

4. Newly mandated assessment requirements do an inadequate job of assessing ELLs, especially regarding academic English needs. Relying too much on these instruments to measure ELL academic progress is a mistake.

Issues related to Measuring Individual Student Progress

Student inexperience with standardized tests

Traditionally, U.S. schools have measured student achievement with individual grades and, to some extent, standardized tests. A half century ago, today's baby boomers took tests such as the Iowa Test of Basic Skills (ITBS); because of their familiarity and widespread use, to most of us, these pencil-and-paper computer-scored tests seem straightforward. Yet for much of the world, standardized multiple-choice tests are uncommon. NCLB requires all students, with some exceptions, to meet specific standards of achievement by taking standardized tests approved by the federal government and to show adequate yearly progress in math, reading, and, most recently, science. Consequently, standardized tests have become increasingly important and used across populations that would previously have "been exempt, e.g. ELLs. Most of these students arrive not only with no standardized test-taking experience, but also still lack basic literacy and even skills we assume in mainstream pre-kindergarten children, e.g. being able to hold a pencil, recognize basic shapes, etc.[6]

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[6] At Iowa State University, we regularly encounter near native-speakers of English who fail the computer-scored listening

Inadequacies of tests

Testing ELLs for English proficiency and content learning is creating other major research and policy issues in the nation's school districts. According to Bailey (2007) whose important edited book, *The Language Demands of School: Putting Academic English to the Test* published by Yale University Press earlier this year, suggests that we lack:

> " ... comprehensive information about what language demands are placed on school-age children in general and how much English language learners can realistically be expected to learn and how quickly. While we have a large literature base about English as a second language (ESL), this research base cannot answer these questions with sufficient specificity to aid policy makers and educators faced with the creation of English language development tests and curricula" (p.2-3).

Bailey subsequently details a key problem relevant to the case at hand: As educators struggle to "implement approaches to help ensure both quality instruction and valid and reliable assessments of all" (p.3), ELLs, who because they often enter school without the English language skills needed to benefit from the mainstream

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comprehension section of our English Placement Test. When we do follow-up interviews, we find that these students, who are typically from Africa, and in some cases have spoken English for most of their lives, tell us that they are simply not accustomed to taking such tests. Thus we find that instead of measuring English comprehension, for certain populations, we are instead measuring test-taking aptitude.

curriculum, are now obliged to take standardized tests, urgently being developed. Current tests fail to measure school language and we lack longitudinal data showing student growth over time. "Collectively, these prove a serious challenge to accurate and useful prediction of language and academic outcomes" (Bailey, p. 4). The main point here is that we are not always using tests that are appropriate for ELLs.

Solutions for the problems of assessing individual adolescent students who are acquiring both English and academic literacy are outlined in the recent report to the Carnegie Corporation (Short and Fitzsimmons, 2007) and include increasing funding to develop tools that appropriately assess the literacy skills of adolescent ELLs.

Test accommodations

Accommodations are widely used in testing ELLs who have not yet mastered English sufficient to handle a particular content test. Accommodations consist of modifications made to the test and/or the test procedure. Typical accommodations include translating a test, or writing it in simple English, allowing the test taker extra time, allowing an interpreter, or allowing the use of a dictionary, etc. Bailey (2007) points out that the problem is that not accommodating to the student's language level may result in our not really measuring what we want to measure, e.g. rather than measuring the student's ability to do particular math problems as we set out to do, we end up measuring his/her language proficiency. On the other hand, using accommodations may show that a student is ready for a mainstream content class when he/she lacks the particular content-specific

language to function successfully in that environment, in this case the language of math. Bailey and Butler (2004) suggest the need to:

- Do a better job teaching students the required academic English rather than place so much emphasis on accommodation

- Devise academic English language proficiency assessments that really help us know whether a student is ready for the language that is required in, for example, a mainstream math class.

Issues Related to Assessing Schools

Just as it can be problematic to apply tests designed for one population to another, it can also be challenging to measure the achievement of all schools using the same measures. For example, *alternative schools,* which serve students identified as being at a higher risk of dropping out, are currently being measured by the same criteria as other schools. Minnesota state lawmakers have recognized this problem. According to a recent article in the *Minneapolis Star Tribune,* State Rep. Carlos Mariani-Rosa, chairman of the House E-12 Education Committee, is planning to work with fellow legislators on better ways to assess alternative schools. According to Mariani-Rosa, "To a large degree, you're looking at a different group of students." (p. 1). A bill introduced this year by State Representative David Bly to provide alternative ways to measure success at alternative schools "went nowhere." (p. 2), despite the pressure, according to president-elect of the Minnesota Association of Alternative Programs (MAAP), Terry

Lydell, to push ". . . the Legislature and the Education Department to come up with better measures of academic success—or alternative education programs." (p.1) According to Lydell, the state needs to go beyond mere graduation rates and test scores when judging alternative programs.

5. Newcomer schools are one recent innovative solution to address the need for accelerated education in young adults with little or no prior schooling and limited English proficiency. These schools are in some ways still experimental.

The arrival of newcomer schools

One of the assumptions of mainstream ESL and bilingual programs is that learners:

- Have literacy skills
- Are acculturated to school learning (Short and Boyson, 2004).

With the arrival of many students who did not fit this category, newcomer schools were created in 30 states to specifically address the needs of these learners. A newcomer school is:

> A program that in a special academic environment for a limited period of time, educates recent immigrant students who have no or very limited English proficiency and who may have limited formal education in their native countries. (Short and Boyson, 2004, p.8)

An evolving process

An ideal newcomer school is "an evolving process" (Short and Boyson, 2004, p. 148) with room for original design to evolve as populations shift and new state and local priorities emerge. Model newcomer programs in which much success is achieved are *flexible* and go beyond the grade-level curricula to create specialized courses to develop students' literacy needs and fill gaps in their prior education (Short & Boyson, 2007).

National study of newcomer schools

In 1996, the National Center for Research on Education, Diversity, & Excellence (CREDE) funded researchers at the Center for Applied Linguistics (CAL) to conduct a four-year study of such programs which was designed to 1) study and document newcomer programs, and 2) document a few programs carefully, looking specifically at their effectiveness for ELLs. *Abraham Lincoln High School in Minneapolis participated in this study and is included in the appendix along with 114 similar programs across the nation.*

Most newcomer programs are found in urban areas (76%) with more than half serving high school students. Table 1 shows other key characteristics of newcomer programs. Nearly half of the programs have class size between 10-19 students and about half offer ESL with smaller percentages offering bilingual and native-language literacy support. Virtually all newcomer schools offer content instruction, the vast majority doing so via sheltered instruction; likewise, nearly all programs offer cross-cultural orientation to the U.S.

Survey of Newcomer Programs, N=115 (2000)

Characteristics	Percentage of Programs
Class Size	
10 -19	49%
20 - 24	25%
24 - 35	22%
Types of language programs[7]	
ESL Program	50%
Bilingual	7%
Native Language	2%
Combination of ESL, BL, NL	41%
Type of Instruction	
ESL or ELD Courses	100%
Native language Literacy	42%
Content Instruction (1 or more areas)	97%
via Sheltered Instruction (SI)	89%
via Native Language Instruction (NLI)	55%
via both SI and NLI	46%
Cross-Cultural/ Orientation to the U.S.	81%

Table 1. Adopted and modified from Short and Boyson (2004)

[7] Type of program offered to newcomers depends on students' native languages and availability of bilingual teachers, paraprofessionals, and instructional materials.

Other typical characteristics include:

- **Smaller classes**
- **"Hand-picked" faculty involved in school governance**
- **Close connections among students, families, and their communities**
- **Field trips and cultural orientation**
- **Specially developed curricula**

Certain beliefs underlie many newcomer programs, including specific attention to certain needs of the population.

- **Meeting literacy needs**
- **Creating a welcoming and nurturing environment which makes the new environment of school feel safe and comfortable**
- **Filling gaps in education and accelerating learning to gain core components**
- **Fostering success through connections between school, family, and community.**

Newcomer schools have been criticized for segregating students from the main student body, but this criticism has been addressed by pointing out that such students are typically ostracized linguistically and culturally in a mainstream school, especially during their first 6 months to a year. One corrective is to provide extracurricular opportunities for interaction with non-newcomer students (Short & Boyson, 2004).

SECTION 3: ABRAHAM LINCOLN SCHOOL

AHLS is a typical newcomer school that addresses the needs of the student population it serves.

a. **Program features are similar to those of other newcomer schools**
b. **AHLS staff are qualified and dedicated**
c. **The majority of AHLS staff uses best practices.**
d. **AHLS curriculum is appropriate and reasonable in terms of its**
    I. Approach and methods
    ii. Materials and techniques
e. **AHLS support-programs are appropriate**

Description of the School

ALHS, currently located at 730 Hennepin Avenue, Minneapolis, Minnesota, was founded in 1996 as a contract alternative high school for newcomers in the Minneapolis Public School system. From its inception, ALHS has served immigrant students ages 14 to 21 (or until age 23 in some circumstances). The school provides a curriculum in history, math, science, literature, social studies, computer technology, as well as intensive instruction in English language.

Specific population

Country of Origin

The school population varies demographically each year. For fall 2005, the annual report lists students from 6 countries in Africa with the largest share (N=109) from Somalia and Ethiopia (N=30) and the remaining 9 from 4 West African countries for a total of 148 Africans. That same semester ALHS had 41 students from Ecuador, 30 from Mexico, and the remaining 4 from Uruguay, Guatemala, and the US. One student was from Vietnam.

The total student population for that semester appears to be somewhere between 324 (p.9 and 233 (p 10).

Length of time in School System

Seventy-two percent of the ALHS students have been in the Minneapolis Public School (MPS) system from between 0 and 2 years and 23% from 2-5 years, and 3% 5-7 years. Only 2% of ALHS students have been in the system for more than 7 years.

Gender Ratio

A higher proportion of ALHS students are male (56% in 2005) than in the district or state where the distribution is close to 50% for each gender.

Eligibility for free and reduced meals

About 96% of the students were eligible for free or reduced meals. (p. 12), compared with 68% for the Minneapolis district and less than 30% for the state.

Limited English Proficient

The school is almost entirely LEP, 90% in 2003, 85% in 2004, and 80% in 2005 (p. 14), compared with 23% for Minneapolis district and 7% for the state for 2004-2005.

Graduation Rate

According to MPS statistics as reported in the ALHS annual report for fall 2005, ALHS had an 18% graduation rate for the 2004-05 academic year. Sixty-two students walked in the ceremony with 4 not passing MBST despite having sufficient credits; 4 needed to complete credits. Fourteen of those who graduated attended ALHS for 4 years and 2 for more than 4 years. About half of the students went on to attend a 2 or 4-year college. Several received scholarships for further education.

Mission

The school's 2005 annual report to the district states the following mission:

> Lincoln International High School seeks to provide an ethnically diverse English immersion environment of knowledge, recognition, and healing for refugees, immigrants, and other disadvantaged students. (ALHS 20005 Annual Report, p. 1; Plaintiff's exhibit 139)

Goals

The same school report states the following goals:

- To be a premier alternative school offering comprehensive educational programs for immigrants and refugees.
- To help students understand their new community (Twin Cities and the USA) and better comprehend the cultural differences between the US and the country in which they grew up.
- To develop an interdisciplinary curriculum designed to meet student's individual needs and to respect the remarkable diversity of the school's students and staff.
- To help students become self-directed, cooperative learners who are directly involved in their educational destiny and in their future roles in this nation.
- To inspire students to reach academic goals including the completion of all credits for a high school diploma and passing all required Minnesota tests.
- To provide supplemental tutoring to assist students to progress in second language development, academic basic skills, and all studies. (ALHS 2005 Annual Report, p. 1; Plaintiff's exhibit 139).

Methods of Instruction

The school is self-described as English *immersion*. In second language immersion programs students are at ". . . similar levels of proficiency in their new language and generally receive input tailored to their needs"

(Richard-Amato, 1996, p. 300). It is clear that classes use a *sheltered-English* model, which is a kind of immersion (Richard-Amato, 1996) in which content in academic classes is modified in order to be accessible to students. Curricular materials reveal a fairly traditional ESL program in which attention is paid to *academic English,* that is, to the special language recognized by research as being needed for academic achievement. The program emphasizes literacy skills. Content classes emphasize academic vocabulary, which is appropriate and a key aspect of sheltered English. Without visiting classes it is impossible to know to what extent students are actively engaged in the content. However, we noted evidence of the following:

- Utilizing learners' own cultural knowledge
- Providing opportunities for group work
- Encouraging learners to take responsibility for their own learning
- Incorporating community contacts and knowledge of community
- Employing a variety of activities
- Using varied materials
- Using computer-assisted instruction[8]

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[8] We saw evidence that computer technology is a central part of the curriculum and this is an important and often neglected in ELL instruction. The School Improvement Application (p. 6, item 6) reports that ". . . technology is a central learning tool" with 3 computer labs with approximately 80 computers, which provides a high ratio of computers to students (approximately 1:3). Syllabi also show evidence of special courses which instruct students in using the computer for academic purposes, an extremely valuable part of any secondary school curriculum today. Instructors also appear to make regular use of computer labs.

Standardized formal assessments used at ALHS

Students attending ALHS typically take several standardized tests described here.

TEAE

The Test of Emerging Academic English (TEAE) has two sections: reading and writing. According to the *Minneapolis Public Schools English Learning District Guidelines,* the reading test uses a multiple-choice format. Each section follows thematically from the previous section, becoming progressively more difficult. Students are encouraged to keep working on the test they arrive at section that is too difficult. The writing test has two sections, one with a picture prompt and the other with test prompt. Any positive change in a student's scale score is considered growth in their reading language proficiency.

MN-SOLOM

An ELL teacher compiles the Minnesota Student Oral Language Observation Matrix (MN-SOLOM); passing score is determined by combining listening and speaking scores.

MBST

The Minnesota Basic Skills Tests (MBST) has three tests in reading, math, and writing components (Ex 312). The test is used as a graduation and accountability measure, meaning that all ELLs must be included in the assessment, with graduation exceptions for LEP students with less than three years of attendance in an English speaking school. The

passing score for reading and math scaled score is 600 (Ex 312, p. 127), and for the writing, the passing score is a 3 (based on holistic sore ranging from 1 to 4).

Other kinds of assessments of student progress

We found evidence of varied informal and on-going assessment important in a setting such as ALHS. Examples include portfolios of student work in upper level English courses, which supplemented more typical quizzes, projects, and tests. Examples of emails between teachers provide evidence of impromptu team meetings to discuss particular concerns about student progress beyond concerns addressed at regular staff meetings.

Qualifications of Teaching Staff

Degrees, Licensure, and Teaching Experience

According to the School Staff Characteristics reported by the Minnesota Department of Education and included in the 2005 ALHS report, most of the teachers at ALHS are well qualified.

Licensure: Using a chart listing 32 teachers employed at ALHS from 2001-2005, we found evidence that all of those listed were either licensed or had a state-approved exemption.[9] In addition to all teachers

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[9] It is important to note that teachers may also bring special talents or skills to a school that should be recognized as valuable, especially if they are appropriate and useful in that particular school context. This would include skills in areas relevant for extracurricular activities such as drama or sports, fluency in a second or third language, skill in teaching using technology, and

having at least Bachelor's degrees, many also had appropriate Masters' degrees.

Cultural and linguistic expertise

Language proficiency: According to the School Improvement Plan for 2005-2006 (p. 6, item 8,) teaching staff represent 13 countries and speak 27 different languages.

Teaching evaluations: Though dated surveys with high response rates or evaluations of teaching from students or peers would be optimal, a survey apparently conducted in the school in 2004-2005 provides some sense of the teaching climate at ALHS. Of staff responding:

- 100% liked working at the school (p.3).
- 100% felt they knew most of their students personally (p. 2).
- 93% felt that staff in the school worked well together (p.3).
- 100% believed they were making an important contribution in the lives of their students (p.3).

In the same survey: 97% of the students said they were proud to be at the school (p.3).

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relevant cultural experiences. Though we agree that the majority of the staff should be licensed in the area in which they are teaching, in some cases, the administration may decide that need and a candidate's otherwise outstanding credentials may outweigh the need for a license.

Teaching observations. Staff developments materials, (D000718) a memo dated November 2005 from Linda Huntzicker indicates that three observations of teachers were planned during the semester, one by core curriculum team leaders, one by Nata Samba, and one by Linda Huntzicker. Appropriately, the SIOP checklist was being used.

On-going professional development: We found a variety of evidence that ALHS staff participated in relevant professional development. Topics included: Sheltered Instruction Observation Protocol (SIOP) training, literacy in mathematics institutes, working with parents of English language learners, and assessment and lesson planning for ELL students. While it would be optimal to have had a more cohesive, on-going professional development program, this is a challenge in many districts because of a lack of federally funded and state support for on-going teacher-quality education.

Curriculum

We judge an exemplary curriculum to be one that makes use of current professional knowledge, utilizes appropriate materials that both engage and challenge students, and includes evidence of adapting to changing student needs. We also look for clarity, careful planning, and clear objectives in line with state standards.

ESL / English / Language Arts

For our review we examined the ALHS English department textbook list, course descriptions, goal statements, proficiency levels, and 20 syllabi from nine

different teachers. The English program has 5 levels ranging from beginner to advanced. The stated goals are appropriate and aligned with state standards.

1) To use English to communicate in social settings
2) To use English to achieve academically in all content areas
3) To use English in socially and culturally appropriate ways in multicultural and diverse settings.

The curriculum itself is grammar-based and integrates speaking, listening, reading, and writing as well as specific support for the language of mathematics. Materials, for the most part, are current and widely respected in the field and from well-regarded publishers such as Oxford and Longman. Techniques apparent on syllabi vary quite a lot among teachers. These include very traditional, but well regarded practices such as dictations, especially in the level 9 classes. However, in one level 9 class and most upper level classes, teachers use innovative attempts to both engage students and provide very appropriate academically oriented materials with attention to academic literacy. Age-appropriate techniques include music, poetry, and art; graphic representation strategies, strategies to enhance vocabulary acquisition and uses of community resources, including field trips to the Guthrie and the Minneapolis Art Institute to create focused assignments, and collaboration with a class at St. Thomas which culminated in a presentation on fables to this audience by Abraham Lincoln students. Well-regarded practices such as dialogue journaling and a process-approach to writing are evident and widespread as is attention to

varied student learning styles. A few syllabi (3 teachers) were not in line with department stated goals and seemed old-fashioned in their presentation of grammar out of a meaningful context, a practice that has fallen out of favor and is not in line with the stated goals of the program. Four teachers had exemplary syllabi: well planned, creative, and appropriate. Three other teachers had syllabi we would characterize as average.

Mathematics

For our review we examined the ALHS math department textbook list, course descriptions, goal statement, proficiency levels; and 14 syllabi from three different teachers. The math program has 3 levels ranging from basic math to college prep/advanced. The stated goal is appropriate:

- Challenge each student with level of math most appropriate to the ability of the student

Aligned to state standards: The samples of the curriculum we examined suggest that ALHS has a math curriculum that is aligned to state and national standards for mathematic education. The math textbooks in the department are supplemented by online resource math software. Test preparation materials are also included.

Differentiated: ALHS has a math curriculum that provided three different levels of course offerings (basic, intermediate and advanced). Based on an individual's background in mathematics, or pre-assessment results, a student is placed in one of the three course sequences (see AL0003895 for description

of sequences). The syllabi indicate that students can move between levels, advancing from a basic to a higher math level sequence once they demonstrate success (grades C or better and teacher recommendations). Given the ELL student population, offering multiple entry points in the math curriculum is a sound differentiation of the curriculum and is consistent with research recommended educational practice for all students (Darling-Hammond, French, Garcia-Lopez, 2002; Gutstein, 2003; Short & Boyson, 2004; Zalvasky, 1996).

Adapted to student needs: ALHS math curriculum appears to be adapted to students needs. Courses appear designed to engage student in learning by providing opportunities for group and individual work; connections to real-world applications of math problems; and using technology (calculators, computer software, web-based math resource) and manipulatives. Moreover, some course syllabi addressed the academic language in mathematics by explicitly teaching math vocabulary; another sample syllabus appeared to integrate ESL Performance Indicators for listening, speaking, and writing.

Social Studies

For our review we examined the ALHS social studies department textbook list, course descriptions, goal statements, proficiency levels, and 13 syllabi from four different teachers. The social studies program has three year-long courses (civics, world studies, and U.S. history) and a number of electives (life skills to economics). The stated goals are appropriate:

- To develop well informed global citizens who demonstrate critical thinking skills.
- To give students the skills they need to thrive in the modem world.

The curriculum itself was linked to district and state social studies standards for social studies.

Rigorous, culturally relevant, and differentiated: ALHS has a rigorous, culturally relevant, and differentiated social studies curriculum that provides courses including life skills, civics, world studies, U.S. history, American government, economics, and electives (AL0003509). In 2003-2004 and 2004-2005, ALHS aligned its social studies curriculum to the district and state standards. The textbooks used in the department are current and well known in the field (e.g. *World Cultures: A Global Mosaic),* supplemented by multi-media (educational videos; music) and other resources. Courses such as life skills and social studies skills provide a needed introduction to American culture and society. Moreover, the social studies curriculum is culturally relevant, stressing attention to the history of Africa, Latin America and Middle East and global issues immigrant students might find more relevant (social justice; impact of urbanization and spread of poverty; historical roots of the Middle East conflict (AL0009745)). Social studies syllabi include attention to the importance of understanding culture; changing societies, and the connections between students' backgrounds to their study of history, culture, society, and governments.

Adapted to student needs: ALHS social studies curriculum appears to be adapted to students needs. Courses appear designed to engage student in learning

by providing culturally relevant content (history and issues of the world and in the U.S.), opportunities for group and individual inquiry projects; connections to real-world issues and topics; and opportunities to use technology. It is worth noting that ELLs who come from different parts and perspectives of the world can contribute their background knowledge and experiences to enrich any social studies curriculum. The course syllabi appear to take advantage of this richness by providing connections and relevance in the content.

Science

For our review we examined the science department textbook list, course descriptions, goal statements, proficiency levels, and 6 syllabi (chemistry, physics, biology, health education) from 4 different teachers. Based on our review of the science department's course offerings and syllabi, we conclude that ALHS offers a satisfactory curriculum that was linked to state and district standards.

ALHS has a science curriculum with course options ranging from general science to Physics (see AL_E0017047 for description of courses). The range of courses suggests individuals have varied choices for meeting the science requirements for graduation, a sound strategy for a diverse population.

Aligned to state standards: ALHS has a science curriculum that appears to be aligned to district and state standards for science education. Course descriptions stated the scientific conceptions, skills and knowledge to be addressed within the course (e.g.

scientific method; investigating and analyzing atomic theory; cell, their structures and functions).

Adapted to student needs: ALHS science curriculum appears to be adapted to student needs. Courses appear designed to engage student in learning by providing at least some opportunities for group and individual projects as well as demonstrations and experiments with manipulatives (e.g. M & M to demonstrate isotope rations). Although one science syllabus identifies the content vocabulary in biology (AL0004016-AL004031), other course syllabi are not as explicit. However, one should not conclude specific content vocabulary development was not in the science classrooms in ALHS, given that content instruction in science relies heavily on vocabulary specific to the field (cell, distance, velocity, etc.) and ideally is developed through hands-on activities and multiple encounters with vocabulary.

Support Programs

Tutoring Program

According to a description in the 2003-2004 Student Handbook, the multi-faceted tutoring program is directed by Chris Nevin, a former Peace Corps volunteer with experience teaching English in Africa and Central Europe. Tutoring is offered during and after school for any student who wants additional academic help. In addition, teachers can refer students for specialized help. Each semester about 40 volunteers are trained and work with approximately 100 students.

Community Partner Program

Directed by the Director of Community and Family Involvement and three cultural advisors (Spanish, Somali, and Oromo), this program is described as promoting learning through "community partnerships," including

- Enhancing relations with parents
- A tutoring/mentoring program

It also includes specific community-driven programs of which the following are examples:

- St. Thomas University Program (N=70, Fall 2003; N=90, Fall 2004, and N=100+, Fall 2005) where students from ALHS work with St. Thomas students on "creative projects."
- Children's Theatre Company Project (N=8; Fall 2005)
- Breck School peer tutoring
- America Reads Program, University of Minnesota tutoring program. This federally funded national program is designed to assist students in need, both tutors and tutees, and includes Spanish, Somali, and Oromo-speaking tutors.

Such peer tutoring programs are important in avoiding cultural isolation for ALHS students and providing positive peer role models in addition to individualized attention. Peer tutoring programs have strong professional support and are widespread in the U.S. The best programs provide training for tutors and utilize students who are enthusiastic and knowledgeable. In the case of ALHS both peer tutors

and college and community contacts are utilized. Such connections, particularly with area colleges and universities are mutually beneficial. Likewise, extracurricular programs such as the Children's Theatre Company project, offer valuable opportunities for students to interact with members of the community outside the school and utilize English in creative and enjoyable ways.

Bilingual Assistance

Though ALHS does not offer bilingual education, it does provide opportunities for students to interact and receive assistance in their native languages. This is available from the three sources: 1) cultural advisors, 2) teachers; many of whom are multi-lingual, and 3) peer tutors. It is important to note that the Minneapolis School District offers several schools that do utilize bilingual approaches, thus providing students and parents with options.

Summary of ALHS features that align with "typical" newcomer schools

- Smaller school
- Smaller classes
- Attention to building safe environment
- Diverse staff with linguistic and cultural knowledge
- Literacy focus
- Content made accessible via modified delivery and student support
- Tutoring services
- Community orientation and outreach
- Program evolving

SECTION 5: THE PLAINTIFFS

Plaintiffs were provided reasonable support for academic success

Individual Plaintiffs

Overview

The plaintiffs in general show remarkable achievement against considerable odds: Before arriving in the US in their mid to late teens, in addition to having little or no knowledge of English, most either lacked or had major gaps in schooling and had no literacy in their mother tongues. These students had a formidable task: Do 12-14 years of academic catch-up with mainstream Minnesotans before reaching 21, when they would be "overage" and ineligible for a free public high school education. In many cases the challenge of language learning and academic catch-up were combined with difficult home lives, including low socio-economic status, separation from immediate family members, and the loss of parents through death, disappearance or divorce. Many of the students had suffered other kinds of trauma and violence and lived in unstable and unhealthy environments in refugee camps for years. Families with low socio-economic levels and low levels of literacy themselves cannot provide the interactions which we know foster language development, e.g. parents who expose their children to texts, read to them, etc. Rather than such support, many of the plaintiffs themselves needed to support their families financially while in school. Despite these deficits and hardships, plaintiff depositions indicate that the plaintiffs expected to be well educated and get high

school diplomas in only 2 to 4 years from their enrollment. Rather than the fast-track progress we heard students say they expected in their depositions, most students made steady improvement characteristic of late adolescent and adult language learners who are new to literacy. Not surprisingly, plaintiffs became frustrated.

The Role of the School

Was the educational program at ALHS reasonably designed to provide its ELL students with access to the curriculum? The facts show a school with a curriculum like that of many schools we have visited, including syllabi that indicate in some cases, exemplary practices and in other cases classes that were at least adequate. Evidence shows dedicated faculty and Staff who worked to meet the diverse needs of their students. On one hand, ALHS was not as innovative as some of the premier newcomer schools and literacy programs in the country. For example, learners from oral cultures tend to benefit from inductive, communicative approaches and all learners benefit from being able to choose methods of teaching that match their learning styles. While the intensive grammatical approach used by ALHS has worked for many learners as a way to gain proficiency academic English, it is not the only way to acquire proficiency in English.

Most of the students, including the plaintiffs, liked many aspects of ALHS, choosing it over other school options, and citing the comfort of being with other members of their community provided as well as especially effective teachers; however, several plaintiffs also complained that they could not get the

help they needed, and especially that they had to wait inconveniently long for tutors. A few of the plaintiffs had other criticisms, in one case, that the food was not good and that the teachers treated students badly, but even this student had favorite teachers. Criticisms from students about school practices is, in our experience, not unusual.

Special education in ELLs is notoriously difficult to diagnose and scholarship to assist teachers is only recently being published. At times; the ELL population has been oversampled as "special education" when language and cultural issues were really the issue. Of course, interventions to enhance learning are appropriate and essential for virtually all learners and while the school lacked systematic documentation of interventions, staff at ALHS show evidence of a collaborative, team-based approach to assisting students and devising appropriate interventions. This approach shows evidence of enhancement and formalization under the guidance of Linda Huntzicker.

1. **Ibrahim Mumid**, born in Ethiopia in 1981, is a native-speaker of Oromo. Mr. Mumid reports that his father disappeared and that his "disappearance was because of the Ethiopian government" (depo 9). After his father's disappearance, Mr. Mumid's brother took him to a refugee camp in Nairobi, Kenya, where lived for four or five years (depo 9-13). Mr. Mumid came to the U.S. with his brothers and sisters and he lived with them for one year and four months before he moved out and got an apartment by himself (depo 18). He reports having had no schooling in Ethiopia and in the refugee camp, was unable to do basic math (adding, subtraction, etc), and did not have any knowledge or understanding of science before coming

to ALHS (depo 15, 16). He attended ALHS from 1999 to 2004 and during that period his MPLS records shows problematic attendance (Ex 42-58). Mr. Mumid worked 15 to 40 hours a week during his time at ALHS (depo 57,58). On his first two attempts at MTEAE reading and writing (Fall 2001 and Fall 2002) showed little to no progress (Reading 160 and 145; Writing 0 on both attempts). By 2003, Mr. Mumid began to show progress, the MTEAE reading increasing from 145 to 175, and writing scoring jumping from 0 to 4 (Ex 0019-0021). His MBST/MCA records show similar incremental progress, in 2003, he scored 491 and in 2004, 508, still below the passing score of 600, but progress nonetheless. Mr. Mumid, who sometimes did not wear his hearing aides to school, received extra support from his teachers and extra tutoring, however his chronic absences and disruptive behavior in class possibly limited the benefits he might have received from this extra support. Although Mr. Mumid reports his siblings had gone to school, there were no indications that he had family support while he lived with his siblings and after he moved out (depo 18; 55; 56). In his deposition, Mr. Mumid reported that he faced eviction, when asked if he had friends or family to live with, he indicated "nothing I know of". In addition, Mr. Mumid reported having had difficulty with hearing as a small child, and did not receive a hearing aid until he started school in the U.S. (depo 23; Ex 0181). His health records indicate that he had corrective surgery in right ear in 2001 and continues to need a hearing aid (Ex 0184; 0205; 0206). Mr. Mumid was not able to meet the graduation requirements and at the age 23, he became over-the age for compulsory education in 2004. Mr. Mumid complained that he did not get the help he needed from ALHS.

Conclusion: Given that Mr. Mumid began school for the first time at the age of 18, was not literate in his native language, worked 15-40 hours a week, had poor attendance while at ALHS, and had little or no support from his family, it is not surprising that he failed to attain a high school diploma during his five years at ALHS. Similar to many LEP students with limited or no formal schooling, these factors alone represent significant challenges to Mr. Mumid's academic achievement. Yet, Mr. Mumid was also hearing impaired (depo 23) and he reported having difficulties hearing his teachers, a fact collaborated by his teachers (Ex 0185; 0186; 0187) and his medical records (Ex 0184; 0204; 0206). The school staff assisted Mr. Mumid in receiving medical attention for his hearing loss. In November, 2001 one of his teachers reported that he might have a learning disability, not uncommon for students who have not had early intervention for hearing loss. The school probably should have referred Mr. Mumid for screening for his hearing prior to 2001.

2. Fadumo Muse, born in Somalia, is a native speaker of Somali. Ms. Muse reported that she and her family (father, mother and siblings) fled violence in Somalia and lived in the "slums" of Nairobi, Kenya for 14 or 15 years (depo, 9). With the sponsorship of her sister, Ms. Muse and her family moved to the U.S. in the fall of 2000. She reports having had no schooling in Somalia or in Kenya, and was unable to do basic math (adding, subtraction, etc), and did not have any knowledge or understanding of science (depo 11-12). In January of 2001, Ms. Muse reported that her sister enrolled her in Roosevelt High School (depo 18-19). During the following year (2001) she transferred to ALHS because "it was near [her] residence," thus

making it easier for her to help her mother after school (depo 24-25). Although Ms. Muse indicated that she did not work while she was enrolled at ALHS, she reported having responsibilities at home (depo 18). She explained: "I was helping my mother a lot, so I would go to classes after I help her out" (depo 18-19). Ms. Muse attended ALHS from the age of 16 to 19 (2001-2004), and during that time period married (9/2003), had a miscarriage (10/2003), and had her first child (7/2004) (depo 14, 45-56,59). With the exception of missed five days after her wedding and the 15 days following her she had a miscarriage, her attendance at ALHS was good (depo 58-59). Her assessment records indicate progress, with her TEAE reading starting at 159 and writing at 1 in 2001, and by the following year her (2002) progressing to 172 and in writing to 12 (Ex. 0252; Ex. 0255). In 2003, her TEAE reading showed a slight decline, while her writing increased again. Prior to 2003, Ms. Muse was exempt for the MBST/MCA as an LEP new to schooling When she learned it would take more time for her to meet the graduation requirement, she withdrew from the school.

Conclusion: The facts show that Ms. Muse began school with many deficits and that many factors in Ms. Muse's background were not conducive to success in language learning or academic achievement. In spite of this, she was making progress as indicated in her TEAE. As is typical with LEP students with limited formal educational backgrounds, her transcript indicates introductory courses (basic math, ESL, science, etc), and courses towards graduation. Given that Ms. Muse began school for the first time at the age of 15 and was not literate in her native language, it was unrealistic to expect she would complete in 3

and ½, years, the knowledge and skills required for a high school diploma. She needed more time to achieve.

3. Fahmo Ahmed, a native speaker of Somali, was born in Somalia on 1982. When the civil war broke out in Somali in 1991, she and her family (mother, father, brothers and sisters) moved to a refugee camp in Kenya (depo 8-9): Ms. Ahmed lived in refugee camp for 8 years before she and her family moved to the United States in 1999 (depo 9). While in Kenya and in Somalia, Ms. Ahmed reported having had no schooling, and was unable to do basic math (adding, subtraction, etc), and had no knowledge or understanding of science (depo 10-11). At the age of 17, Ms. Ahmed reported that her family enrolled her at Roosevelt High School (depo 15), where she remained for one year (11/1999-5/2001) (depo-289-30). During her time at Roosevelt, Ms. Ahmed married and became pregnant with her first child. In February 2002, five months into the academic year, Ms. Ahmed enrolled at ALHS. She attended ALHS from the age of 20 to 22, (2/2002-8/2004), and during that time had good attendance (Ex.0313). Her assessment records indicate progress, with her MTEAE reading starting at 170 and writing at 1 in fall 2002, and by the following year her (2003) TEAE Reading progressed to 184 and Writing to 3 (Ex. 0321). Similar incremental progress is evident in her MBST scores. Her MBST math score progressed to 550 by the summer of 2004. She did not pass the MBST requirement to receive a high school diploma, although Ms. Ahmed "walked" during 2004 graduation ceremonies (depo 44-56). After having her second child, Ms. Ahmed began attended the Franklin Learning Center, an adult education school.

Conclusion: Given that Ms. Ahmed began formal schooling at the age of 17, was not literate in her native language, did not have any knowledge or understanding of science (depo 11-12), it is not surprising that she struggled to pass the MBST during her two years at ALHS. While Ms. Ahmed was a young mother eager to complete her education, it is unrealistic to expect such rapid gains.

4. Safiya Mohamed, a native speaker of Somali, was born in Somalia on 1982. At the age of seven or eight, she and her family (mother, father, brothers and sisters) moved to a refugee camp in Kenya (depo 8-9). Ms. Mohamed lived in Kenyan refugee camps for 8 years before she and her family moved to the United States in February, 2000 (Ex 0417; depo 9-10). Ms. Mohamed reported having had attended "Gahayer Elementary School" in Somalia (Ex 0417) and studying language, math, and history before leaving due to civil war (depo 10-13). When she was 17, she enrolled at Washburn High school (9/2000) which she attended for two months; six months later she enrolled at Arlington High School (9/2001 to 11/2001). At the age of 19, she enrolled at ALHS (1/2002 to 8/2004). Despite her frequent moves between schools, Ms. Mohamed's assessment records indicate some progress, with her TEAE Reading starting at 2001 at level 1 and progressing to Level 2 by 2004. She did not progress as well in her TEAE writing; her scaled score increase from 12 in 2001 to 15 in 2003, or Level 1 (Ex. 0446). Her MBST records indicate progress in both reading and math. Although Ms. Mohamed accrued enough credits to graduate (Ex 2072), she did not pass the MBST and was not issued a diploma by the district (depo 32). She complained that the school did not tell

her about the MBST requirements and did not serve her needs.

Conclusion: Given Ms. Mohamed's history of interrupted education, age, LEP status, and multiple transfers between schools, her MBST and MTEAE progress indicate reasonable progress. Similar to students in her situation, she showed unrealistic expectations about the speed at which she could acquire a high school diploma.

5. Iftu Jibril, a native-speaker of Oromo, was born in Ethiopia in 1983. She reported being beaten (Depo 11-12) and witnessing violence (Depo 10-13) before moving to a refugee camp in Kenya where she lived for 2 years (Depo 9-10). She reported having had no schooling in Ethiopia and being non-literate and unable to do basic math before coming to ALHS which she attended between the ages of 16-21. For about 4 years during that time she lived with her sister (who could not read or write English) and her sister's family (about 10 people).(Ex 0612, p 17), later living with a friend and then living alone. She had outstanding attendance despite working significant hours (10.5 hours per week during 2001-2004) (Depo 58-61). Her test scores show improvement in English as measured by the TEAE Reading level I in fall 2001 and level 2 in fall 2003; in writing she moved from level 1 to 3. Her writing score on the MBST likewise moved from a level 1 in 2002 to a level 2 in 2004, but her scores in reading and writing on the MBST dropped. Though she received 101 credits and had a 2.6 GPA she did not graduate. From March 2005-March 2006, she attended Adult Options in Education classes (Ex 0510) where she was placed into beginning ESL and eventually reached high intermediate before she left without

explanation. She complained that she did not get the help she needed to learn.

Conclusion: Five years was not sufficient for this student to achieve the proficiency in academic English and the content knowledge she needed to make up for the many years of lost education and other factors working against school success.

6. Maymuna Muktar Osman, a native-speaker of Oromo, is an Ethiopian, born in 1981. She immigrated to the U.S. at age 20 (Depo 11) after spending 3 years living in a Nairobi slum in Kenya (Depo 60). She reported never having attended school before her arrival in the U.S. and was non-literate in her mother tongue (Ex0783, p8). Because of her age, she was assigned to adult education and attended Lehmann Center for ABE and the ESL program from October 2001 to March 2002, but wanted to attend high school and subsequently enrolled in ALHS, which she attended from March 2002 to January 2006, from age 20 to 25. In addition, she worked approximately 15-20 hours doing maintenance work from April 2005 to January 2006 while enrolled at ALHS (Ex. 0632). Upon arrival she showed recognition of the alphabet and could count to 10 in English, but scored 0 on basic math skills and on the TEAE in Fall 2002 and also scored very low on reading (52) and writing (4). A year later she had made great gains in those scores (reading, 144 and writing 15). She received regular tutoring 4-5 hours weekly Spring 2004, Fall 2004 and Fall 2005 (Ex. 0662) where she was described as "determined" and "hard working," making "good, but slow progress with developing her English skills." A classroom intervention worksheet dated 2/18/05 (Ex. 0670), notes that she had a B in pre-algebra and had

"improved a lot since last year" in math. An intervention sheet for English done on March 17, 2005 notes "very low English skills" and "currently doing D work (65%) in an adult diploma program." (Ex. 0671). Both intervention worksheets note recent poor attendance. By 2004, in spite of a D in Pre-Algebra (Ex 0728), she scored 74% on the MBST Practice Test I and 85% on Test 2. In April 2005, she took the MBST, but was exempted from passing due to LEP status (Ex. 0752). The student reported being told she was overage and would need to leave ALHS, but continued to attend and reported graduating in 2006 (Ex.0793, Depo, p. 42). Her transcript (Ex. 0716) shows 60 credits with a GPA just under 2.0. She graduated in January 2006 and began attending Adult Basic Education at the Franklin Learning Center in February 2006.

Conclusion: The facts point to a student who had much working against the success she expected, that is, a high school diploma in 2 or 3 years, This would be a great achievement even for a student with considerable schooling in his/her first language. Her initial gains in achievement as measured by test scores suggests that she was making good progress, and her subsequent slower progress seemed to be the cause for teachers initiating the problem solving method in Spring 2005. Some interventions were attempted, but there is no evidence that they resulted in improvement.

7. Mishah Ibrahim, a native speaker of Oromo, is an Ethiopian, born in 1983. He reports being literate in Oromo (Ex. 1885, p. 6) and studying English at the Dire Dawa Comprehensive Secondary School. When he vias 15 or 16 he fled the political strife in Ethiopia,

Where his father had been taken away and his two brothers killed (E1886, p. 11) (Ex 1885, p.8) and resettled in Kenya. At 17 or 18 he left Kenya for the US. He attended Champlin Park High School from November 2001 to June 2002 where he took classes taught in English with no support in his native language (ex.1887, p. 14). Subsequently, he transferred to ALHS and began working at the airport 40 hours weekly, beginning at noon and ending at 9 p.m. He believed that he could graduate in about a year and half (ex. 1889, p.21). Though he did not pass MBST Math or Reading, he made steady progress, advancing from 39% to 65% correct on the Math test (Ex. 0805) and from 30% to 53% on Reading. (Ex 0806) After leaving ALHS, he again took on full-time work in order to meet family obligations, including sending money to his mother and cousins in Ethiopia (Ex. 1892, p 36). Mr. Ibrahim has been diagnosed with rheumatic heart disease (Ex. 1892, p. 35-36).

Conclusion: The facts support Mr. Ibrahim as having had a background not conducive to success in language learning or academic achievement. His stress-filled life had major gaps in his education and major financial strains, which at times meant he was working full-time work while in school. Combined with health issues, this would have seemed to have left little opportunity for the extended learning recommended for adult newcomers. Considering these circumstances his progress as measured by MBST is admirable.

8. Amal Mohamed, born in 1984, is a native speaker of Somali who spent 10 years in Kenya before immigrating to the US when she was 14. She was enrolled at ALHS from February 2000-June 2005 with a brief interruption during which time she transferred

to Roosevelt. She entered the school with a score of 5/60 on basic math and level 2 English. A memo from tutoring supervisor, "Mr. Chris," (Ex. 0947, p. 348) on 5/05 indicated Ms. Mohamed had strong speaking skills and a good attitude, but was "below average in reading and writing." TEAE scores show virtually no change between 2001 and 2004. Documents indicate work with tutors during the 2004-2005 academic year, which was " . . . challenged by poor attendance on the part of the student" (Ex. 0949, p.350), though, she tended to focus when present and sometimes chose to read alone during tutoring sessions. She took the MBST in February 2005 and received a 519 in Math and a 504 in Reading; she did not take the Writing test A report from a teacher (Ex 1095) indicates a lack of effort and interest in learning on the part of the student and "more interest in socializing than learning." Others note trouble reading and "working independently" and "staying focused." (Ex 1107) She received a Section 504 Individual Accommodation Plan in June 2005 indicating "post-traumatic stress" (Ex. 1092).

Conclusion: This student had many challenges, including a trauma-filled childhood, the challenges of poverty, etc. that are not conducive to academic success. In spite of this and to her credit and the school's, she graduated. Her interest in socializing, her strong oral skills, and difficulty working independently suggests why she might find a traditional classroom frustrating. This was recognized by at least some instructors who tried to assist by allowing her to work in groups, reminding her to focus, etc. This student had needs that seemed to be addressed, to the extent possible, by the school.

9. Shamsa Ali Mohamed was born in 1981 in Somalia. A native speaker of Somali, she spent 12 years in a Kenyan refugee camp (Deposition 12-13) before immigrating to the U.S. when she was 17. She indicated that she had had no schooling, was non-literate and had no basic math skills when she entered the U.S. (Ex 1222, p. 14). Placing into Level 1 (no English) on initial placement tests, she attended ALHS between January 2000 and February 2003, between the ages of 18-21. A grade report from 2000-01 (trimester 1) (Ex 1184) includes comments on poor attendance and trimester 4 of that academic year shows all § and at least one instructor indicates Ms. Mohamed is not attending; she earned no credits for that semester. In contrast, during trimester 1 of 2001-2002, she earned all Cs with 3 teachers commenting on her hard work. However, in subsequent trimesters performance deteriorated with teachers again indicating incomplete assignments and poor attendance (Ex. 1200). After ALHS she attended the Lehman Center from 11/05-3/06, reentering in 12/06, but attending only one day.

Conclusion: Given the extremely low level of schooling with which Ms. Mohamed started, the strains of her family life (a one-parent family with 6 children in the US and another brother left behind in Kenya) (Ex. 1224) and the gaps in her attendance at ALHS, it is not surprising that she failed to attain a high school diploma in such a short time. These factors were made worse by poor attendance; indeed we see evidence that Ms. Mohamed did well when her attendance was good. Facts point to ALHS doing an admirable job of supporting this student's needs. Ms. Mohamed reported that her math teacher at ALHS provided help when she sought it (Ex 1226, p. 31, line

31), and after going to Roosevelt for a week, Ms. Mohamed decided ALHS was better and returned. Ms. Mohamed seemed to have unrealistic expectations about the speed at which language learning and academic learning can be accomplished and her periodic poor attendance did not enhance the likelihood of her success.

10. Yurub Siyad, a native-speaker of Somali, was born in 1983 in Mogadishu, Somalia. She and her family fled to Kenya to escape the civil war. She had had no schooling prior to coming to the US in 1999 at the age of 16. She first attended school in Milwaukee before enrolling in ALHS in October 2002 at the age of 19 where she remained until the age of 22 (2005). In March 2005 several teachers informally assessed her as having a reading level of grade 1. In spite of being "eager and very motivated to learn" Ms. Siyad struggled with at least some aspects of academic life. Her test scores do not show a clear pattern, with MBST in math remaining almost flat from 2003 to 2005, and reading showing both gains and losses. Nevertheless, tutors, with whom she worked from 2 to 7 hours weekly during the 2004-05 school year, noted that her math skills were " . . . developing much faster than her English reading skills" (Ex 1370). However, her writing scores show major gains between 2002 and 2004 (4.5-15) and in February 2005 she received a 547 on the MBST in reading. In March 2005, she had a B in pre-algebra and a memo from her teacher notes her ability to stay focused and complete assignments and her enjoyment and ability in math, a class she subsequently stopped attending and dropped (Ex 1381) according to a memo from June 2005. A memo that same spring 2005 noted that she had completed her

credits and was not exempt from the MBST, but that the school would assist in applying for a 504 plan.

Conclusion: The 504 alleviated the need for Ms. Siyad to pass the MBST. Evidence shows she received some interventions from teachers and significant amounts of tutoring. In short, ALHS made attempts to address Ms. Siyad's academic learning issues.

11. Muna Mohamed, a native-speaker of Somali, was born in 1981. She witnessed violence during the civil war, fled Somalia with her family, and lived in a Kenyan refugee camp between 1996-99 (Depo 12) She attended first grade in Somalia (Interrog.1; Interrog. 16), contradicted in Depo p.14) where she says she was taught only informally and that both parents were literate in Somali. After immigrating to US in January 1999, she attended high school briefly in Arizona (Depo 17) and then joined her cousin's family in Minneapolis where she attended Armstrong High School from March through September, 1999, then Roosevelt High School from October 1999 to January 2000. She dropped out to work and then attended ALHS between 6/27/01 and 8/29/04, initially scoring 2 out of 60 on the basic math placement test taken 6/25/01. We see in school records evidence of Ms. Mohamed mostly positive attitude, good attendance, and good grades and steady growth on the TEAE and MBST with a score in Reading on July 2004 of 576 (63 %) only a few years after entering with only basic English skills. Indeed the last time she took the MBST, she passed in Math (602 (76%)) and was very close to passing in Reading, remarkable considering that her total schooling was approximately 6 years and disrupted at that. Not surprising, her writing skills were still not up to the level Minnesotans expect of 12th graders, but

writing skills often lag behind for mainstream students for a variety of reasons (with 74% of Minnesotan 10th graders scoring only at the "basic composition level," one level higher than Ms. Mohamed). Apparently this student "walked" at graduation at age 19 and due to reasons unclear to us, she did not remain at ALHS for the 2 additional years to which she is legally entitled. She is currently employed as a shoe sales person working on commission in addition to her hourly salary.

Conclusion: Given the brevity of and major gaps in her schooling both prior to coming to the U.S. and after immigration, Ms. Mohamed has done remarkably well. Given her progress to date, it is probable that she could have graduated, had she remained in school. There is evidence that ALHS staff performed well in helping this student move from basic to fairly high levels of academic competence. Though she would have liked more help than she said she received, she spoke positively of several teachers and the tutoring coordinator and of the efforts leachers took to help.

12. Amina Harun, a native-speaker of Somali, was born in 1983 and attended school in a refugee camp in Kenya, where her family fled to escape the civil war in Somalia. She reports being literate in Somali with some literacy in English and having parents literate in Somali when she arrived in the U.S. at the age of 19. However, her initial tests upon arrival show only basic literacy and low math skills. She had good attendance and made good grades (GP A 3.6) during her time at ALHS, despite working approximately 20 hours weekly between 2003-2005. After graduating from ALHS in June 2005 she became a full-time student at the University of Minnesota where she has maintained a

strong grade point average in spite of having surgery and continuing to work part-time.

Conclusion: Evidence supports a major gain in English proficiency and math skills as measured by the progress of test scores between 2003-2005. Grades at the University of Minnesota corroborate these findings. From the evidence we conclude that ALHS offered the student what she needed to achieve the academic skills to succeed at a university and ALHS staff support in her application. Her prior literacy and the literacy of her parents likely were factors contributing to her success.

13. Mohamud A. Mohamed, a native-speaker of Somali, was born in 1984 and, after experiencing war-related trauma, spent 6 years in refugee camps in Kenya (Ex. 1936, p. 9) coming to the US when he was 16. He reports being literate in Somali with literate parents. (Ex. 1935, p.6) and attended Koranic schools periodically where he studied the Koran in Arabic (Ex 1936, 11). He attended ALHS from age 16-21 (9/2000-7/2005) when he graduated. In addition to attending ALHS, where he had an outstanding attendance record, including perfect attendance from 2002-2005, reports attending tutoring sessions at ALHS at least once a week (Ex 1939, p 22); he also took night classes at MTS Technology High School and sought tutoring in other settings. For 6 weeks in the fall of 2004, he spent 25 hours a week working in an internship arranged by ALHS. He advanced from a raw score of 16 (level 2) on the TEAE writing in 2001 to a raw score of 28 (level 5, proficient) in 2004. He received a level 3 on the MBST writing in July 2004 and a passing level 77% on the MBST reading in 2004. On MBST math he achieved a

passing 76 %, having received 41 % on the same test in 2003. His transcript, (Ex. 1722, shows only a few low grades with an overall GPA of almost 3.1 and over 81 credits by the time he graduated. He is now an American citizen attending college and planning a career in health care.

Conclusion: Mohamud Mohamed is a success story. He came with several advantages: Some prior literacy experience and schooling, relatively less socio-economic pressure. For example, he did not work while attending school except during the brief internship after his language proficiency was relatively stronger. In addition, he had parental support, e.g. a stepfather who arranged for additional tutoring, allowing him to receive additional learning time to make up for his late start. What's more, his own motivation is evident in his excellent attendance and high performance in school.

Summary of the cases

Unrealistic expectations

Many of the 13 students whose depositions we read had unrealistic expectations about the speed with which they could learn basic and advanced academic English, acquire literacy, and learn cultural knowledge and academic content and skills. Most showed little understanding of school culture, including what a diploma represents.

Lack of alternatives

Students who arrive in their mid to late teens are forced with an almost impossible scenario: Squeeze in

12 years of education before reaching 21 or be forced to give up a diploma and a free education for a more expensive and less prestigious G.E.D. program. Schools cannot be held responsible for this unfair situation in which we are placing refugees. While accelerated programs are important and should continue, districts and states need to consider alternatives.

Factors contributing to less successful outcomes

Earlier in this report we outlined some of the factors which have been shown to contribute to less success in language learning and in school. These include starting one's education as an older learner, lacking literacy in native language, being from a low socioeconomic group, having an unstable family situation, having health problems, etc. These factors influenced learner outcomes, sometimes outweighing efforts made by the school to assist students.

SECTION 6: SUMMARY AND CONCLUSIONS

1. **Research-based models:** Research suggests there are no easy one-size fits all solutions for schools and districts facing the challenges of educating adolescent ELLs, many of whom are pre-literate and facing a variety of other challenges. A variety of research-based and well-respected approaches and methods exist and there is evidence that these are being used at ALHS. Bilingual models are not mandatory; neither the Lau Guidelines (Lau v. Nichols, 1974) nor current research demands this, nor do we believe that it is necessarily ideal for all contexts. It is clear that Abraham Lincoln is

using a Sheltered-English approach, a reasonable alternative for schools with mixed language groups.

2. **Assessment issues:** A key problem for schools and districts and ultimately students are the assessments we have at present. We agree with Short and Fitzsimmons, 2007 who suggest:

> "Without effective assessments, even experienced teachers can be hard pressed to disentangle students' difficulties in learning English from issues related to their educational background and native language literacy skills. Moreover, it is hard to distinguish normal English acquisition from academic delay and/or learning disabilities without culturally and linguistically sensitive assessments" (p. 18).

3. **Newcomer Model:** Newcomer schools are a recent phenomenon and still evolving as new waves of immigrants and refugees bring new challenges and researchers and educators continue to develop solutions. We see ALHS as a school that is continuing to improve and adjust to the needs of the students it serves. It is not surprising if these attempts do not always meet with the students' own perceptions of their needs.

4. **Qualified Teachers:** Given the national shortage of qualified teachers that urban schools with high ELL populations can recruit, ALHS has done well in finding qualified

teachers, some of whom also represent students' heritage languages and cultures.

5. **Best practices:** Judging from syllabi, there are teachers in every department who show evidence of "best practices." We find ALHS to be a fairly typical school in that there are both weaker and stronger teachers. We find ALHS teachers as a group dedicated to serving their students and working hard to over-ride the incredible disadvantages their students have when they begin school.

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WITNESS QUALIFICATIONS

Roberta J. Vann, Ph.D.

A. Experience and Education

I began my ESL teaching career as a Peace Corps volunteer (Ethiopia) and later served as a Fulbright Lecturer in Poland at the University of Gdansk before coming to Iowa State University. I am currently a professor in the program in TESL/Applied Linguistics in the Department of English where I teach a variety of courses in TESL/applied linguistics, most frequently graduate courses in: Literacy methods for teaching non-native speakers of English and sociolinguistics. I also supervise the practicum in TESL, which involves mentoring future teachers and regularly takes me into public schools.

My scholarly work includes a reading textbook, an edited work on oral and written language relationships and other publications which have centered around enhancing second language learning for academic purposes, including learner strategies and teacher classroom practices.

Outside of Iowa State I've done professional development for teachers around the world, including Thailand, Syria, the former Yugoslavia and Peru. I've done similar work with South African teachers in the U.S. and most recently have been working with science teachers in Iowa to incorporate appropriate strategies for ELLs into their classrooms.

Service includes heading the program for TESL certification at Iowa State University and serving on

committees in Iowa Department of Education to improve the quality of education for ELLs in Iowa.

A copy of my *curriculum vitae* is attached.

B. Publications Authored Within Last 10 Years

See *curriculum vitae* attached.

C. Compensation for Study and Testimony

$100 hourly

D. I have not testified as an expert witness at a trial or deposition.

Dr. Afra A. Hersi

A. Experience and Education

I am an Assistant professor in the Department of Education at Loyola College in Maryland. My program area is Reading Education and my work includes the preparation of undergraduate and graduate students seeking K-12 teaching certification as well as educators seeking advanced certification as Reading Specialists. I have a Ph.D. in Curriculum and Instruction with a concentration in Literacy, Language and Culture, from the Lynch School of Education at Boston College. My areas of expertise include literacy and second language development of adolescent English Language Learners, social contexts of identity for immigrant youths, critical multicultural education and teacher education, and teacher quality in urban schools. My most recent research focused on the cultural adaptation and schooling experiences of 11 African immigrant students from Cape Verde, Ethiopia, Liberia, Sierra Leone, and Somalia, nearly half (5 out of the 11) of the students had limited or interrupted formal education. Moreover, I was a volunteer for an after school program serving Somali youth in a Boston high school.

In the past six years, I planned, collaborated on, and conducted, research in urban education, bilingual education, English language learner programs, educational change and school reform. I have worked with a number of professional development projects specifically designed for urban high schools. In addition I have presented at professional conferences such as the American Education Research Association

and The American Association of Colleges of Teacher Education.

See also *curriculum vitae* attached.

B. Publications Authored Within Last 10 Years

See *curriculum vitae* attached.

C. Compensation for Study and Testimony

$100.00 hourly

D. I have never been a witness at a trial or by deposition.

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Ph.D. English Education, 1978, Indiana University
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B.A. English, 1970, Indiana University

REPRESENTATIVE ADMINISTRATIVE AND PROFESSIONAL EXPERIENCE

- Project Investigator, Enhancing Science Instruction for English Language Learners In Iowa, a grant ($70,000) State of Iowa, January 2005-August 2006.

  Dept. of Education State Steering Committee on Iowa Teacher Quality Enhancement Grant for English Language Learners (2005-2008).

- Review Editor, *TESOL Quarterly,* June 2001-December 2004.

- On-site Review Panel Member, NIH/DOE-funded grant proposals, "Development of English Literacy in Spanish Speaking Children," April 2000. (Washington, D.C. and Santa Barbara, CA)

- Coordinator, Academic ESL, Iowa State University, 1997-2006.

- Coordinator, ESL Certification Program, Iowa State University, 1985-present.

- Assistant Chair, Department of English, Iowa State University, November 1994-1997.

- Director, Intensive English and Orientation Program, Iowa State University, August 1980 - August 1987.

- Director, South African Teacher Training Institute (USIA grant, $52,000) Iowa State University, July 1986 - August 1986.

TEACHING and TEACHER EDUCATION

Iowa State University
Professor, English
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Courses: TESL Methods and Materials, Literacy Methods and Materials, TESL Practicum, Sociolinguistics, Discourse Analysis, ESL Academic Writing, ESL Academic Reading.

At other sites (INVITED)

- Presenter/in-service trainer, ELL, Des Moines Area Community College Staff In-service, "Connecting with Adult Literacy Needs." October 28, 2006, Ankeny, IA.

- Workshop leader/in-service trainer, ELL, State of Iowa, Enhancing Science Education

in Iowa, In--Service Seminar for Science Teachers and District Science Consultants, August 2005 (Amana, IA.) & August 2006 (Scheman Center, Ames, IA).

- Workshop leader/teacher trainer, TEFL, YMCA, Taipei and Taiwan, Taiwan. December 1999.

- Workshop leader/teacher trainer, TEFL, United States Information Agency (USIA), Topic: Reading Skills and Strategies for the 90's, Nov. 23- Dec. 1, 1992: Khorat Teachers College, Khorat, Songkhla Teachers' College, Songkhla,; Payap University, Chiang Mai Teachers' College, & Chiang Mai University, Chaing Mai, Thailand.

- Workshop leader/teacher trainer, learner strategies, Dept of Defense, "Assessing Learner Strategies--A Whole-Learner Approach."Defense Language Institute, Monterey, CA. (with R. Abraham), August 15-17, 1990.

- Workshop leader/teacher trainer, English for Scientific Purposes, Aid for International Development (A.I.D) LaMolina Agricultural College, LaMolina, Peru. (On-site September 1986 and June 1988).

- Miscellaneous 1-2 week workshops on innovative methods for TEFL: Levice Czechoslavakia; August 1984; Damascus, Syria; August 1980; Poznan, Poland; August 1976; Banya Kavetia, Yugoslavia;

June 1976; Poznan, Poland; July 1975; Krk, Yugoslavia; February 1975; Krapinski-Toplice, Yugoslavia; January 1975.

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J. Levis, (ed.), K. Bruna, D. Douglas, J. Olson, & **R. Vann.** 2005. Enhancing and Advancing Science for English Learners. (250-page manual for inservice teacher education), 2005.

PRESENTATIONS

PLENARY ADDRESSES (INVITED)

Vann, R. The teacher as manager: Teaching reading strategies for the 90's and beyond. Plenary address given at the Chulalongkorn University Language Institute National Seminar, Chulalongkorn University Bangkok,Thailand. December 3, 1993.

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PAPERS AT PROFESSIONAL MEETINGS SINCE 1997

R. Vann. 2006. Apologies in Academic E-mails, AAAL-ACLA/CAAL Conference, Montreal, Canada, June 17th.

R. Vann, et al. 2006. Enhancing and Advancing Science for English Language Learners (EASEL): Project Update. Iowa Culture and Language Conference, Des Moines, IA, Feb. 16, 2006.

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Language Learners, Iowa Culture and Language Conference, Des Moines, IA. Feb. 17, 2005.

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Richardson Bruna, K., **Vann, R.** & Escudero, M. 2005 The Language-Content Relationship in Science Instruction for English Learners: Examining the Didactic Tension, Annual Meeting of the American Educational Research Association, Montreal, Canada, April 11-15, 2005.

Richardson Bruna, K., **Vann, R.** "But Are You Gonna Work at the Plant?" Mexican Migrant Students' Status and Roles in an "English Learner Science" Classroom: Navigating the Borders of Language, Meaning, and Social Structure, Annual Meeting of the Society for Applied Anthropology, Santa Fe, NM, April 5-10, 2005.

Bruna, R. K. **R. Vann**, & M. Perales Escudero. 2004. "Academic Language" in Science Teaching and Learning. Cultural Diversity and Language Education Conference, University of Hawaii, Manoa, September 18th, 2004.

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Vann, R., J. Call, M. Cheng, P. Ramburuth, J. Reid, E. Violand. 1998. Asian learning style preferences and classroom implications. Colloquium presented at TESOL, Seattle, WA. March.

EDUCATIONAL MATERIALS

MEDIA

R. Vann, K. Bruna, J. Levis, J.Olsen. 2006. EASEL: Enhancing and Advancing Science for English Learners. (1 hour dvd funded and prepared for the Iowa Department of Education.

A. Foegen, **R. Vann**, C. Fuhler, D. Merkley, D. Niday, and D. Schmidt. Addressing Diversity in Classrooms: Video Case Studies in Literacy: A Miller Faculty Fellowship Project on DVD and WebCt. Iowa State University, 2005.

Abraham, R., B. Matthies, B. Schwarte, and **R. Vann**, (directors and eds.) 1984. *Classroom Roles of the Teacher of English as a Second Language.* (A videotape series of six 20-minute tapes). Production originally sponsored by ISURF and later marketed by the National Council of the Teachers of English (NCTE) and distributed worldwide.

SIMULATION GAME

R. Vann, C. Sosa, L. Hirsu, K. Richardson Bruna, *Life in a a Second Language: A Simulation,* Developed for Iowa Department of Education, August 2006. Presented August 2006, April 2007, and July 2007 to a total of approximately 900 educators in the state of Iowa.

HONORS, GRANTS, AWARDS

Grant, State of Iowa, Department of Education, 2006, "Life in a Second Language, (P.I.), $5,900.

National Screening Committee, U.S. Student Fulbright Program, 2006-2007, Grants for Graduate Study Abroad.

Grant from the State of Iowa, Iowa Department of Education, "Enhancing Science Instruction for English Language Learners in Iowa. (P.I.) ($70,000) to conduct project with K.Bruna, D. Douglas, J. Levis, January, 2005-October 2006.

Outstanding Article of the Year 2003, *The Journal of Business Communication.* (Co-authored with Helen Ewald).

Special Research Initiative Grant (SPRIG), (Co-P.I.) Iowa State University ($15,000) to conduct project with K. Richardson-Bruna, "Teaching the Language of School: An Exploratory Study of the conceptualization and implementation of Science-Related Academic Language Instruction for Iowa's Language Minority Students." 2004.

Miller Fellowship Grant, Iowa State University ($25,000), with Anne Foegen et al. To create on-line video, July 2003-June 2004.

Discipline Advisory Board for Fulbright scholar awards in TEFL/Applied Linguistics (1990-1993) & 2005-07.

USIA grant to conduct ESL project in Thailand, Academic Specialist Program, November 1992.

Faculty Improvement Leave, August 1987-May, Stanford University.

USIA Training Grant, (Primary investigator). To conduct in-service education for 25 South African leaders in education. July 1986 ($58,500).

Student Affairs Human Relations Award, May 1986.

Who's Who Among American Women, 1985

Fulbright Fellow, 1974, 1975 to lecture in English at University of Gdansk, Poland.

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ACADEMIC DEGREES

Ph.D. 2007	Curriculum and Instruction: Language, Literacy and Culture, Boston College, Lynch Graduate School of Education, Chestnut Hill, Massachusetts,
M.Ed. May 2002	Curriculum and Instruction, Boston College, Lynch Graduate School of Education, Chestnut Hill, Massachusetts

B.S. May 1993 History, Social Studies, and Secondary Education, Radford University, Radford City, Virginia
Licensure: Secondary History and Social Studies

PROFESSIONAL EXPERIENCE

2005- Present **National Manager of Curriculum and Instruction**, BELL (Building Educated Leaders for Life) Foundation, Boston, MA.

- Served as national coordinator for a leading educational non-profit serving 8,000 elementary school students in Massachusetts, New York, Maryland and the District of Columbia.
- Managed a $600,000 budget and negotiated with curriculum vendors.
- Aligned after school and summer reading and math curriculum to state standards.

Developed and oversaw the implementation of professional development for certified teachers and college students that serve as tutors.

2004-2005 **Teachers for a New Era Research Assistant,** Boston College, School of Education and Graduate School of Arts & Sciences. Chestnut Hill, MA. Funded by the Carnegie Corporation.

- Conducted qualitative research exploring Arts and Science faculty mentoring of English and History

secondary student teachers in urban placements.

- Worked with a collaborative research team to design interview and observation protocols for a planned longitudinal study following graduates of the BC teacher education program into their first two years of practice.

2002-2004 **Title II Research Assistant**, Massachusetts Coalition for Teacher Quality and Student Achievement, Boston College, Massachusetts.

- Collaborated on the improvement of parent engagement in an urban high school through a school-university partnership.
- Co-conducted a qualitative research project on pre-service teachers' perceptions of the field-based graduate course "Social Contexts of Education."
- Collaborated with in-service teachers on improving community engagement English language learners in mainstream classrooms.

2002-2004 **Program Director**, Perseverance Curriculum Project, Boston Women's Heritage Trail, Boston MA

Developed and implemented a values-based curriculum highlighting the contributions of women. The

curriculum was implemented in eight Boston Public middle schools.

PUBLICATIONS

Peer reviewed Book chapters

2008 **Hersi, A.** & Shirley, D. From Radical Visions to Messy Realities: Complexities of Urban Education and the Preparation of Teacher Educators. In F. Peterman. *Partnering to Prepare Urban Teachers: A Call to Activism.* Washington DC: AACTE.

Peer reviewed articles

2006 Shirley, D., **Hersi, A.,** MacDonald, E., Sanchez, M., Skidmore, C. & Tutwiler, P. Bringing the Community Back in: Change, Accommodation, and Contestation in a School and University Partnership. *Equity & Excellence in Education,* Amherst, Massachusetts, February, 2006, pp 27-36.

2005 **Hersi, A.** (2005). Educational challenges and sociocultural experiences of Somali students in an urban high school. *NABE: Journal of Review of Research and Practice,* Vol. 3, Mahwah, NJ: Lawrence Erlbaum, pp 125-143.

TEACHING EXPERIENCE

Fall 2006 **Instructor**, ED 101 "Teaching Language Arts," Lynch School of Education, Boston College

- Undergraduate course—required for elementary

education majors; focused on oral and written language development in addition to a wide variety of teaching methods in language arts.

Summer 2005 **Instructor**, ED436 "Curriculum Theory and Practice," Lynch School of Education, Boston College

- Graduate course—explored the link between curriculum theory and practice; the contemporary educational and political issues driving curriculum reform and its impact on educational practices.

Spring 2005 **Instructor**, SOC104 "Sociology of Education," Sociology Department, Brandeis University, Waltham, Massachusetts

- Undergraduate course—explored macro and micro-level sociology of schooling, school culture, educational policies, institutionalized inequity and theri impact on schools and communities.

Summer 2004 **Co-Instructor**, ED435 "Social Context of Education," Lynch School of Education, Boston College

- Graduate course—examined the social, political, and economic factors that influence the context of education.

Fall 2003 **Co-Instructor**, ED435 "Social Context of Education," Fall 2003 Lynch School of Education, Boston College

- Graduate course, taught on-site at an urban high school; focused on the relationships between school-community engagement.

Fall of 2001 **Pre-Service Practicum Experience Supervisor**, Lynch School of Education, Boston College,

- Conducting classroom observations, and mentoring and evaluation of pre-service teachers in an urban secondary practicum placement. Facilitated student-teachers' inquires into their content-area knowledge, pedagogy, and social-cultural context of schooling and their impact on instruction.

1999-2001 **Social Studies Teacher**, Lexington High School, Lexington Public School, Lexington, MA

- Taught U.S. and World History mainstream and an inclusive classrooms.
- Developed and implemented curriculum for social studies elective courses.

1998-1999 **World Studies Teacher**, North High School, Worcester Public School, Worcester, MA

- Taught World History to ninth grade students as part of interdisciplinary team.
- Established an after school homework center.

1993-1998 **World History teacher**, Robinson and Lake Braddock Secondary Schools, Fairfax County Public Schools, Fairfax, VA 22193

- Team taught an ESL World History course and an interdisciplinary World Civilizations Humanities course.

INVITED LECTURE

2004 **Hersi, A.,** "The education of Somali youth: Comparative experiences in North American and Europe." International Conference on Somalis in America: The Challenges of Adaptation, St. Paul, Minnesota.

PROFESSIONAL CONFERENCES AND PRESENTATIONS

2006 **Hersi, A.,** "You are not a white. You are a Black just like me! How recent African immigrants make sense of race in an urban newcomer high school." Institute for the Study and Promotion of Race and Culture Diversity Challenge, Boston College

2005 **Hersi, A.,** Skerrett, A., Gutierrez, K., Reid, S., & Watts, L., "For the new scholar: The

art of preparing proposals to present educational research." Holmes Partnership Annual Meeting, Philadelphia. PA.

2004 Shirley, D., **Hersi, A**., MacDonald, E., Sanchez, M, & Tutwiler, P., "Building communities of inquiry and practice: Maximizing learning in the social contexts of education." The American Association of Colleges of Teacher Education Annual Meeting, Chicago, IL.

2004 Shirley, D., **Hersi, A.,** MacDonald, E., Sanchez, M, & Tutwiler, P., "Successes and challenges of multifaceted collaborations within a school-university partnership." American Education Research Association Annual Meeting, San Diego, California.

2004 **Hersi, A.**, 2004 "Double alienation: The educational experience of Somali in an urban highschool." National Association of Bilingual Education (NABE) Annual Conference, Albuquerque, NM.

2004. Shirley, D., **Hersi, A.,** MacDonald, E., Sanchez, M, & Tutwiler, P., "Teacher education as community organizing: Exploring the social contexts of education to promote parent engagement in urban schools." Holmes Partnership Annual Meeting, San Diego, CA.

2003 **Hersi, A.,** "The Education of Somali students: The role of schools." 46th Annual Meeting of the African Studies Association, Boston, MA.

2003 Shirley, D., **Hersi, A.,** MacDonald, E., Sanchez, M, & Tutwiler, P., Williams, W. "School-university collaboration for urban school reform: Challenges and strategies for overcoming them." Holmes Partnership Annual Meeting, Washington, DC.

WORKSHOP PRESENTER AND GUEST SPEAKER

2006 Co-presented a 20 hour institute with a Boston College collaborative team on "Teaching Reading and Writing to Limited English Proficient Students" to an urban high school.

2005 Designed and presented professional development in-service on "Effective Strategies for Bilingual Learners" for teachers and tutors working with an elementary after school program.

2005 Designed and presented professional development in-service on "Culturally Relevant Teaching" for elementary school teachers.

2004 Guest Speaker on "Working with Bilingual Parents" in Spring 2004, "Teaching Bilingual Students" at Boston College.

PROFESSIONAL SERVICE

2006 Regional Journalistic Priorities for Education: The Next 5 Years, an invitation only forum by WGBH, the Nellie Mae Education Foundation, and The Boston Foundation

2005 Reviewer *Educational Policy Journal*

2004-2005	Dean Search Committee, Boston College, Lynch School of Education
2002-2004	Reviewer *Journal of Teacher Education*
2002-2004	Graduate Student Recruitment and Outreach, Lynch School of Education Graduate Admissions Office

PROFESSIONAL AFFILIATIONS

American Education Research Association
American Association of Applied Linguists
African Studies Association
Holmes Scholar
National Bilingual Education Association
National Council of Teachers of English
National Council of Social Studies Teachers
(UNITE) Urban Network to Improve Teacher Education

COMMUNITY SERVICE

Volunteer tutor for beginning English as a second language (ESL) classes for adults Cambridge, MA
Volunteer tutor for Somali Youth Program, Boston, MA

DIGITAL LITERACY

Experience with SPSS, HyperResearch, Atlasti, PowerPoint, and other Microsoft software.

LANGUAGES

Native Somali Speaker
Experience translating Somali
Beginning Spanish

179 (3)

No. 10-703

Supreme Court, U.S.
FILED
DEC 30 2010
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In the

Supreme Court of the United States

Ibraham Mumid, Fadumo Muse, Fahmo Ahmed,
Safiya Mohamed, Iftu Jibril,
Maymuna Muktar Osman, Misbah Ibrahim,
Amal Mohamed, Shamsa Ali Mohamed, Yurub Siyad,
Muna Mohamed, Amina Harun,
and Mohamud A. Mohamed,

Petitioners,

v.

Abraham Lincoln High School,
The Institute for New Americans,
Special School District No. 1 and
Metropolitan Federation of Alternative Schools, Inc.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

INSTITUTE FOR NEW AMERICANS/ ABRAHAM LINCOLN HIGH SCHOOL'S BRIEF IN OPPOSITION TO PETITION FOR REVIEW

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Questions Presented

I. Whether petitioners have presented a compelling reason to review the Eighth Circuit's holding that petitioners failed to state a prima facie case of intentional discrimination under Title VI based on the school district's policy of deferring special education evaluations for English Language Learners until they had received three years of academic instruction when:

(A) Petitioners' argument is based on a false premise that the policy is discriminatory on its face, which is contrary to the Eighth Circuit's holding and not addressed in the petition;

(B) The policy differentiated between students based on individual test scores, not on national origin per se; and

(C) Eleven of the thirteen petitioners suffered no injury as a result of the policy because they did not suffer from the "specific learning disabilities" required by federal law.

Parties to the Proceeding

Pursuant to Rule 14.1(b), the caption includes all parties appearing here and before the Eighth Circuit Court of Appeals. The Institute for New Americans notes that Abraham Lincoln High School was a program operated by The Institute for New Americans and is not a separate legal entity.

Corporate Disclosure Statement

Pursuant to Rule 29.6, The Institute for New Americans discloses that it is a privately held, not-for-profit corporation. It does not have a parent corporation, nor are there any publicly held corporations that own 10% or more of The Institute for New Americans' stock.

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Statement of the Case

I. The Parties

A. Abraham Lincoln High School is a non-public, contract alternative school serving recently-arrived teenage immigrants who do not speak English and have no prior education.

The Institute for New Americans ("INA") is a non-profit organization established to provide educational services to immigrants. Record at A-App. 290, 763 (citation to Eighth Circuit Appendices). In addition to an adult basic education program, INA operated Abraham Lincoln High School ("Abraham Lincoln"). *Id.* at 29, 67-68.

Abraham Lincoln is a contract alternative school under Minnesota law. *See* Minn. Stat. § 124D.68, subd. 3(d) (2010); Record at A-App. 925. Contract alternative schools are *non-public* schools that operate under contract with a public school district. Minn. Stat. §124D.68, subd. 3(d). Only students who are at risk of not graduating from traditional high schools are eligible to enroll in contract alternative facilities like Abraham Lincoln. *See id.*, subds. 1, 2(2), 2(10). As defined by statute, at-risk students include those who are at least one grade level behind their peers and/or are English Language Learners ("ELL"). *Id.*

Abraham Lincoln focused on a particular subset of students—immigrants who arrived in the United States between the ages of fourteen and twenty, had little or no prior education, were illiterate in their native languages and could speak

little-to-no English. Record at S-App. 1616. About two-thirds of the student body was eighteen or older, and most (around 95%) lived below the poverty level. Record at A-App. 839, 794, S-App. at 1225.

Unlike many schools, Abraham Lincoln had a highly diverse faculty that mirrored its unique student body. Teachers and staff represented thirteen different countries, with many of the teachers and administrators being highly-educated immigrants. *See* Record at S-App. 1770, A-App. at 816-817, 840, 852, 879, 880, 891. For example, Mohamed Wadi, an assistant principal, spoke four languages, was a physician in his native country and had a Masters Degree in Public Health. *Id.* at App. 852, 879, 880, 891. Nata Samb, the academic dean, was a native of Senegal who held Bachelor of Arts Degrees in English and French, a Masters Degree in English Literature, and a Masters Degree in Educational Policy and Administration. *Id.* at A-App. 816, 819; S-App. 1912, 1911. Science teacher Leeka Gwanganlie, similarly, was a Uganda native with Masters Degrees in Physics and Education. *Id.* at S-App. 1908-09, 1911-12, 1497, 1521-24.

In addition to its teaching staff, Abraham Lincoln employed Zahra Samatar, who acted as the special education liaison with the District. *Id.* at A-App. 899. Samatar worked with the part-time special education staff that the District sent to the site weekly to conduct evaluations and provide special education services. *Id.* at A-App. 840, 852.

B. The thirteen petitioners were Abraham Lincoln students who recently had arrived from Somalia and Ethiopia, had little or no prior education and were illiterate in their native languages.

The thirteen petitioners here are characteristic of Abraham Lincoln's student body. With one or two exceptions, they had no prior education, were illiterate in their native languages, and spoke little to no English upon enrollment. *See* Record at A-App. 523, 588, 608, 612, 675, 691, 699, 719. The majority--eight of the thirteen--enrolled at age eighteen or above. *Id.* at S-App. 1497, 1521-1524, 1548, 1603; A-App. 530, 572, 608, 615, 676.

Under Minnesota law, a student's right to a free public education terminates at age 21. *See* Minn. Stat. § 120A.20 (2010). Similarly, under federal law, students no longer are eligible for special education evaluation, testing or services after age 21. *See, e.g.*, 29 U.S.C. § 1412(a)(1)(A), (B).

II. The lawsuit.

A. Petitioners asserted Title VI and MHRA claims against Abraham Lincoln for national origin discrimination in education.

In their Second Amended Complaint, petitioners asserted two claims against Abraham Lincoln: (1) a Title VI claim, alleging that Abraham Lincoln discriminated against them based on national origin in providing educational services; and (2) a Minnesota Human Rights Act ("MHRA") claim, alleging the same. *See* Record at A-App. 77-78. They

did not assert an EEOA claim against Abraham Lincoln, as it is not a public "educational agency" subject to that law. *See, e.g., id.*; 20 U.S.C. §§ 1703(f), 1720, 7801(26), (41) (2006).

Petitioners generally averred that Abraham Lincoln did not use an appropriate curriculum, "warehoused" students in entry-level classes, failed to communicate graduation requirements and failed to provide special education testing and services. Record at A-App. 67-69. The complaint alleged that petitioners Ahmed, Amal Mohamed, Osman, Jibril, Muna Mohamed, and Shamsa Mohamed "likely suffer from a learning disability," while Siyad "suffers from a learning disability." *Id.* at A-App. 70-72. Abraham Lincoln's alleged educational failures, petitioners claimed, constituted intentional discrimination on the basis of national origin in violation of Title VI and the MHRA. *See id.* at A-App. 899.

B. The District Court held that petitioners failed to state a prima facie case of intentional national origin discrimination and that eleven of the petitioners lacked standing to challenge the special education policy.

After the close of discovery, Abraham Lincoln moved for summary judgment on the grounds that petitioners had failed to state a prima facie case for intentional discrimination under Title VI. Title VI, Abraham Lincoln argued, required a showing of intentional discrimination (i.e., disparate treatment); disparate impact did not suffice. *See* Pet. App'x B at 24a, 33a.; *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001)(Title VI requires disparate treatment). Since

petitioners failed to provide any evidence of discriminatory intent, the district court granted Abraham Lincoln's summary judgment motion on that basis. *Id.* at 51a.

The District Court also held, with respect to the claim that the school district wrongfully deferred special-education evaluations for English Language Learners until they had received three years of education, that eleven of the thirteen failed to present any evidence that they were eligible for those services. *See* Pet. App'x B at 39a-40a. They accordingly lacked standing to challenge the allegedly discriminatory special-education policy.

C. The Eighth Circuit affirmed and held that the special-education testing policy was not discriminatory on its face.

The Eighth Circuit affirmed the District Court's holdings on appeal. Pet. App'x A at 19a. In doing so, the appellate court expressly rejected petitioners' claim that the alleged policy of deferring special education testing and assessment for English Language Learners was discriminatory on its face. *Id.* at 10a. Delaying testing for English Language Learners did not single out a protected class on its face, the court held, as ELL status is determined by the score an individual student receives on an English-abilities test and not on his or her national origin per se. *See id.*

The Title VI issue presented in the petition for writ of certiorari is whether "direct evidence of discriminatory intent" is required to challenge a "facially-discriminatory policy....based on

[petitioners'] national origin." Petitioners did not identify as a question on appeal, nor did they argue in their petition, that the Eighth Circuit erred in finding that the deferred-testing policy at issue is not discriminatory on its face.

Reasons The Petition Should Be Denied

I. Petitioners have not satisfied the conditions required to secure review by this Court.

More than 100 years ago, Congress created the Circuit Courts of Appeals to relieve this Court from the burden of general litigation. *See In re Woods*, 143 U.S. 202, 205-06 (1892). Since then, this Court has been chary in granting certiorari, limiting its grant to matters involving a conflict between the Circuit Courts or weighty issues of public interest. *Forsyth v. City of Hammond*, 166 U.S. 506, 514-15 (1897). Certiorari should not be granted in cases that primarily are of interest just to the parties involved. *See id.*

While petitioners cite more than a dozen cases, they identify no split among the Circuits on the Title VI question they present for appeal. Nor do they identify any compelling public interest to address a special-education testing policy for English Language Learners utilized for a limited time by a single school district. Because the review petitioners seek would benefit no one but themselves, the petition should be denied.

A. The petition fails to identify any conflict among the Circuits on the issue presented for appeal.

• The Title VI issue, as framed by petitioners, is whether "direct evidence of discriminatory intent is required to sustain an action against...a...school engaged in facially discriminatory practices...based on [petitioners'] national origin." *See* Pet. at i. They cite *UAW v. Johnson Controls*, 499 U.S. 187 (1991),

in support of their contention. In *Johnson Controls*, this Court held that a policy which required only female employees to provide proof of infertility in order to work in certain positions discriminated against women on its face; it was not transformed from an intentional discrimination claim into a disparate impact claim simply because the employer did not have a malevolent motive. *See id.* at 197-99.

In this case, the Eighth Circuit recognized the holding in *Johnson Controls* and its progeny, but found it inapplicable to the case at bar. *See* Pet. App'x at 10a. The deferred-testing policy for English Language Learners, the court opined, did not single out a protected class on its face. *Id.* The policy did not apply to all foreign-born students in the school district, but only those individuals who scored below the cut-off point on the English-language test. *Id.* at 10a. Students of the same national origin who had more advanced English skills, and accordingly were not categorized as "English Language Learners," were not subject to the policy. *See id.*

The Eighth Circuit's decision in this case, then, not only does not conflict with any other Circuit Courts, it is not even at odds with *Johnson*. Since petitioners failed to identify any conflict among the Circuits or with Supreme Court precedent, the petition should be denied.

B. Petitioners assertion that "[t]he courts are in dire need of a rule to find disparate treatment where there are facially discriminatory policies at work" asks the court to do nothing more than re-affirm *Johnson Controls* without there having been a challenge to it.

In lieu of identifying a weighty and serious matter of public interest warranting this Court's attention, petitioners embark on a meandering soliloquy that lower courts may hesitate to apply *Johnson Controls* without additional direction from this Court, and that this Court must "send a message to other schools" that "they can[not] contract their way out of liability [for intentional discrimination]." Neither contention has merit. The Eighth Circuit's decision does not conflict with or undermine *Johnson Controls*, and the fact that Abraham Lincoln was a contract alternative school had no bearing on petitioners' failure to present a prima facie case of disparate-treatment discrimination.

Johnson Controls was a Title VII case in which the employer implemented a policy barring all potentially fertile women from jobs exposing them to certain levels of lead. *Id.* at 192, 196-97. Although the Seventh Circuit acknowledged that the fetal-protection policy was directed solely towards women, it analyzed the policy as if it were neutral on its face and only had a discriminatory *impact* on women's employment opportunities. *Id.* at 194-97. This Court granted certiorari to resolve a split among the circuits and address whether an employer lawfully could discriminate against women solely because of

their child-bearing ability when motivated by a desire to protect the fetus. *Id.* at 196.

This Court held that the policy explicitly discriminated against women based on sex. *Id.* at 197. Because the policy required only female employees to prove that they were not capable of reproducing in order to work in the specified jobs, the policy was sexually discriminatory on its face. *Id.* at 198. The fact that the employer may not have had a malevolent motive did not convert the facially-discriminatory policy (i.e., a disparate treatment claim) into a neutral policy with discriminatory effect (i.e., a disparate impact claim). *Id.* at 199.

Respondents here do not quibble about the *Johnson Controls* decision or its import. Abraham Lincoln has not argued—nor did the Eighth Circuit hold—that a policy that is discriminatory on its face does not constitute evidence of intentional (i.e., disparate treatment) discrimination. Rather, Abraham Lincoln argued that the policy here *was not facially discriminatory*, because the policy differentiated based on individual test scores and not national origin per se. The Eighth Circuit agreed.[1] Since the Eighth Circuit's decision does not either conflict with or undermine *Johnson Control's* holding,

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[1] The Second Circuit Court of Appeals likewise has held that "language, by itself, does not identify members of a suspect class." *See Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983), *cert. denied*, 466 U.S. 929. And the district courts, too, have found that Title VI does not prohibit discrimination on the sole basis that a person speaks a primary language other than English. *See, e.g., Franklin v. District of Columbia*, 960 F. Supp. 394 (D.D.C. 1997), *rev'd on other grounds*, 163 F.3d 625 (D.C. Cir. 1998

the public interest does not require further review by this Court.

II. Eleven of the thirteen plaintiffs have no standing to seek review because the Eighth Circuit held that they had not sustained an injury in fact and petitioners have not identified that issue for consideration by this Court.

It is beyond contention that Article III jurisdiction must exist in order for this Court to accept review of petitioners' claims. Article III, Section 2 of the United States Constitution restricts the jurisdiction of the federal courts to "Cases" or "Controversies." *Arizonans for Official English v. Arizona*, 542 U.S. 43, 64 (1997). Standing to sue is part of this requirement.

In order to have standing, the plaintiff must allege that (1) he has suffered an injury-in-fact; (2) the injury is traceable to the defendant's actions; and (3) the injury likely will be redressed with a favorable decision. *See Bangerter* v. *Orem City Corp.*, 46 F.3d 1491, 1498 (1995)(citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 2136 (1992)). "[T]he . . . courts have no business deciding [matters], or expanding the law in the course of doing so," if the plaintiffs have not sustained an actual injury, regardless of how important the legal issue is. *Freedom From Religion Found. v. City of Green Bay*, 2008 WL 4516853 at *2 (E.D. Wis.)(quoting *Daimler Chrysler Corp. v. Cuno*, 654 U.S. 332, 341 (2006)).

The district court found, and the Eighth Circuit agreed, that all but two petitioners (Amal Mohammed and Yurub Siyad) lack standing to

challenge the deferred-testing policy because they failed to provide any evidence of injury caused by that policy. *See* Pet. App'x at 9a, n.3. As to all petitioners other than Amal Mohammed and Yurub Siyad, then, the petition must be denied due to the lack of a case or controversy conferring jurisdiction on this Court.

Petitioners claim they had standing to challenge the deferred-testing policy because testing could "rule out" disabilities, as well as diagnose them. Pet. at 21. As "candidates for this testing," they say, they were injured because they were not evaluated to establish that they did *not* have learning disabilities and were not eligible for special education services. *Id.* This argument is based on an erroneous assumption that every student has a legal right to be evaluated for special-education assistance.

The Individuals with Disabilities Education Act ("IDEA") governs the extent to which the student is legally entitled to "special education" services, including testing and evaluation. 20 U.S.C. §1400 et seq. "Special education" means specifically-designed instruction to meet the unique needs of a *child with a disability*. 20 U.S.C. § 1401 (29)(emphasis added).

A student is a "child with a disability" only if he suffers from a statutorily defined impairment. *See* 20 U.S.C. § 1401 (3). Being a "slow learner" alone is not enough. *See Wong v. Regents of Univ. of Cal.*, 410 F 3d 1052 (9th Cir. 2005)(having an impairment does not mean a person is "disabled" as defined by the statute). Recognized impairments include a "specific learning disability." 20 U.S.C. § 1401(3).

A "specific learning disability" means:

> [A] disorder in which one or more of the basic psychological processes involved in understanding or in using language...manifest[s] itself in the imperfect ability to listen, think, speak, read, write...or do mathematical calculations....

20 U.S.C. § 1401(20). However, a "specific learning disability" does "not include a learning problem that is primarily the result of...environmental, cultural, or economic disadvantage." *Id.* A student with a "specific learning disability," then, does not include a student whose academic progress is impeded by non-disability-related factors, such as poor attendance, lack of motivation or limited educational opportunities.

Regulations promulgated under the IDEA expressly forbid schools from categorizing a student as a "child with a disability" if:

> (1) The determinant factor for eligibility determination is –
>
> (i) Lack of instruction in reading or math; or
>
> (ii) Limited English proficiency; and
>
> (2) [T]he child does not otherwise meet the eligibility criteria.

See 34 C.F.R § 300.534 (effective to 10/12/06); *see also* Minn. R. 3525.1341 (2008).

With only two exceptions, the petitioners (Harun, Mohammed A. Mohammed, Ahmed, Ibrahim,

Safiyah Mohamed, Osman, Siyad, Iftu, Shamsa Mohamed, Muse and Mumid) each testified under oath that he or she does not suffer from a learning disability. Record at A-App. 704, 754, 504, 586, 543, 562, 677, 549, 624, 494, 476. Petitioners must be bound by their own admissions.

Furthermore, petitioners failed to present any testimony by a qualified special-education expert that their individual progress suggested a "specific learning disability," as opposed to lack of prior education or evolving English language skills. Since the petitioners did not have a "specific learning disability" as defined by federal law, they were not eligible for special education testing or services under the IDEA. And, since they were not eligible for testing, they have sustained no injury as a result of the District's policy of deferring special education evaluations until ELL students had received three years of academic instruction. The petition accordingly must be dismissed with respect to these eleven petitioners for lack of standing and a justiciable controversy.

Conclusion

Petitioners have failed to identify a split among the Circuit Courts of Appeals on the Title VI issue presented for review, and further have failed to identify any compelling public interest worthy of this Court's attention. In addition, eleven of the thirteen petitioners lack standing to challenge the special education policy at issue. Abraham Lincoln respectfully requests that the Court deny the Petition on these grounds.

Respectfully submitted,

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In the Supreme Court of the United States

IBRAHIM MUMID, FADUMO MUSE, FAHMO AHMED, SAFIYA MOHAMED, IFTU JIBRIL, MAYMUNA MUKTAR OSAMAN, MISBAH IBRAHIM, AMAL MOHAMED, SHAMSA ALI MOHAMED, YURUB SIYAD, MUNA MOHAMED, AMINA HARUN, AND MOHAMUD A. MOHAMED,
Petitioners,

v.

ABRAHAM LINCOLN HIGH SCHOOL, THE INSTITUTE FOR NEW AMERICANS, SPECIAL SCHOOL DISTRICT NO. 1, AND METROPOLITAN FEDERATION OF ALTERNATIVE SCHOOLS, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

An important issue of first impression presented by this Petition is whether the Equal Education Opportunity Act (EEOA), 20 U.S.C. § 1703(f), provides a damages remedy. The opposition briefs do not respond meaningfully to this issue.

First, respondents compare the EEOA damages issue to unrelated Rule 60(b)(5) and EEOA interpretive issues of *Horne v. Flores*, 129 S.Ct. 2579 (2009). They further improperly conflate issues of special education law adjudicated by the Minnesota Department of Education (MDE) with claims material to questions presented for review by this Court.

Second, respondents compound errors of fact and law made by the District Court and ratified by the Eighth Circuit by parroting a distorted view of respondents' claims. Respondents contend that petitioners assert only that English language learner (ELL) policy had a disparate impact on immigrant students. In fact, facially discriminatory policies against *foreign-born* students wreaked acute misfortune upon immigrant students, more so for immigrant ELL students.

Third, respondents grant undue weight to the Eighth Circuit's purported findings that the Minneapolis schools' delayed testing policy was not facially discriminatory and that petitioners waived this argument. Based on petitioners' evidence, however, the District Court actually found a facially discriminatory policy, but failed to apply *UAW v. Johnson Controls*, 499 U.S. 187 (1991), due to mixed

errors of law and fact. Petitioners timely appealed this ruling and raised it in the Eighth Circuit.

Fourth, respondents confuse the delayed testing and substandard education claims under both the EEOA and Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, and thereby erroneously argue petitioners' alleged lack of standing.

Finally and most egregiously, respondents argue that petitioners' claims are unlike those vindicated in *Johnson Controls*.

Respondents present no valid grounds for denying the Petition. Education is an important issue in this country today. Failure to educate is even more important. The incidence of a failure to educate falls 100 percent on those not educated, and virtually not at all on those responsible for the failure. Congress has passed a statute intended to right this grievous wrong. The statute is not being enforced by the courts, however, to its full and intended effect, when a damages remedy, not expressly excluded by the statute, is denied. It is vital for this Court to consider and decide this question.

I. The Issues in This Matter Differ Markedly From The Issues in *Flores* and From Those Adjudicated By MDE

Horne v. Flores considered whether defendant state and local education agencies should have been granted relief under Federal Rule of Civil Procedure 60(b)(5) from remedial orders following findings that they had violated the EEOA. 129 S.Ct. 2579. These orders required ELL funding increases based on a cost study.

Flores, 129 S.Ct. at 2590. The *Flores* decision provided for using Rule 60(b)(5) to limit prophylactic remedies in "institutional reform litigation" (including EEOA cases). 129 S.Ct. at 2593. The Court was concerned that prospective long term, or open-ended, decrees could have "the effect of dictating" state and local policies, depriving elected officials of their powers. 129 S.Ct. at 2593-94. "For these reasons, [this Court held that] a critical question in this Rule 60(b)(5) inquiry [was] whether the objective of the [] declaratory judgment order- *i.e.*, satisfaction of the EEOA's 'appropriate action' standard- ha[d] been achieved." 129 S.Ct. at 2595. In other words, where a "durable remedy" has been implemented prospectively by a District Court after findings of EEOA violations, *Flores* held "continued enforcement of the order [] not only unnecessary, but improper." *Id.*

This case is not *Flores*. Although both *Flores* and this case arise under the EEOA, that is where the similarities stop. The petitioners here seek damages for harms suffered from respondents' violations of the EEOA, precisely because long term prospective equitable remedies are *not* available, petitioners having been allowed to "age out" of the educational system.

Damages under the EEOA are among those "remedies essential to correct particular denials of equal educational opportunity," 20 U.S.C. § 1712, particularly for EEOA plaintiffs who like petitioners cannot continue with their education. The issue of damages for past harm under the EEOA was not squarely before this Court under *Flores*. To interpret the issues of this matter (remedies for past harm) consistently with the limited remedial scheme for

prospective harm contemplated by *Flores*, this Court should allow for the full complement of remedies for past harms. To do otherwise would be to inform those found in violation of the EEOA that they bear no responsibility to victims of their violations once they have excluded them from their school systems.

Respondents mis-cite *Flores* for leaving discretion to local and state education authorities to take "appropriate action" required by the EEOA. *Flores*, however, reviewed only whether Rule 60(b)(5) relief should have been granted in that EEOA action. *Flores* cannot properly be distorted to stand for the proposition that in all EEOA actions, the issue of an "appropriate" remedy is left to the discretion of the violator, as respondents argue.

Similarly, the MDE determinations have no direct bearing on the appropriate remedy in this matter, other than to show the nature of the violations. MDE framed the question addressed in its investigation as follows: "the Complainant alleges that when a student is having difficulties in school, the District does not refer the student for evaluations for special education and related services, but instead, places the student back in an earlier grade." Pet. App. 64a. "School districts must have systems 'designed to identify pupils with disabilities beginning at birth' and attending both public and non-public schools, or not attending any school but who are of school age. Minn. R. 3525.0750." Pet. App. 81a. The MDE looked at whether certain ALHS students, including some petitioners, were denied the benefit of state regulations implementing special education statutes. The MDE order considered only the possibility of compensatory education remedies under the IDEA for

students with identified disabilities. *See* Pet. App. 89a. Petitioners' litigation and the questions presented to this Court relate to relief for national origin discrimination under the EEOA and Title VI (as well as the Minnesota Human Rights Act).

There is simply no *Flores* issue here of deference to local authorities. They have done nothing and can do nothing to remedy the injuries they have inflicted on petitioners other than to compensate them—which is the precise issue presented for this Court's review.

II. Eighth Circuit Ratified the District Court's Mixed Errors of Law and Fact, Thus Failing to Consider or Apply *Johnson Controls*

Petitioners' second question presented, whether direct evidence of discriminatory intent is required to sustain an action against operators of schools engaged in facially discriminatory practices, Pet. at i, fairly includes all lower court errors of law on this matter. Rule 14.1(a) provides that "any question presented is deemed to comprise every subsidiary question fairly included therein." Hence, this Court necessarily has jurisdiction over any such subsidiary errors. Rule 24.1(a) further allows this Court to consider "plain error[s] not among the questions presented but evident from the record."

The District Court, when applying law to this matter, disregarded and failed to follow *Johnson Controls* by not recognizing that respondents' practices discriminated against immigrant students *on their face*, in that they applied by their very terms only to students of foreign origin. The District Court order

made this issue of law ripe for appeal to the Eighth Circuit.

The Eighth Circuit, when faced squarely with this question (of whether direct evidence is required), sidestepped the question altogether. For delayed testing claims, this holding was based on either waiver or the Eighth Circuit's finding contrary to the District Court that "no policy of the District or ALHS singled out a protected class on its face." Pet. App. 9a-10a. For substandard education claims, the holding was based on either waiver or the lack of a comparator. Pet. App. 9a-11a.

First, the waiver grounds for the Eighth Circuit holding are simply wrong.

Second, the District Court found a facially discriminatory policy for delayed testing, but failed to apply *Johnson Controls*. The District Court found that respondents "had a general policy of refusing to test foreign-born students for special education services until the students had taken three years of ELL classes," Pet. App. 40a. The District Court then made a combined error of law and fact by applying the *McDonnell Douglas* balancing test—without *Johnson Controls*' modifications to *McDonnell Douglas* for facially discriminatory policies—as though the delayed testing claim were a disparate impact claim. It assuredly was not. Petitioners timely appealed this error, which the Eighth Circuit ratified. The issue is therefore ripe for review in this Court and has not been waived.

Finally, the substandard education claims were denied on grounds of lacking a comparator through

which to prove intent. Because the policies at issue were discriminatory on their face, however, *Johnson Controls* allowed intent to be inferred without the necessity of a comparator. It was error for the Eighth Circuit not to recognize this.

These errors are clearly within the second question presented for review by the Petition.

CONCLUSION

For the foregoing reasons, review should be granted. The rulings below leave petitioners in the position of having shown egregious violations of their rights under federal and state law having life-long and life-altering consequences, for which they are left with no remedy under decisions resting on only a determination of Congressional intent by implication, although Congress has never said anything that remotely supports that conclusion, and such a conclusion offends traditional notions of fair play and substantial justice.

Respectfully submitted,

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